

THE THIRD PART { Though first }
Publish'd, }
OF THE
REPORTS
OF
S^r George Croke K^t.
Late, one of the JUSTICES of the COURT
OF
KINGS-BENCH
And formerly one of the *Justices* of the Court
OF
COMMON-BENCH,
OF SUCH
Select Cases

As were *Adjudged* in the said Courts, during the first
Sixteen years Reign of King Charles the First.

*Collected and Written in French by Himself; Revised
and Published in English*

By Sir HAREBOTTLE GRIMSTON Baronet,
Master of the ROLLS; and one of the Benchers of the
Honourable Society of *Lincolns-Inn*.

The Second Edition, Carefully Corrected by the Original.

L O N D O N :

Printed for A. Roper, T. Collins, F. Tyton, J. Place, J. Starkey, and T. Bassett,
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WE all knowing the great Learning,
Wisdom and Integrity of the Au-
thor, Doe (for the Common
good) Allow and Approve the Publishing of
this Book, in the same Letter and Dialect as
now is Printed.

Robert Foster.

Orl: Bridgeman.

Matthew Hale.

Thomas Malet.

Robert Hyde.

Edward Atkins.

Thomas Twisden.

Thomas Tyrrill.

Chr: Turner.

Samuel Browne.

Wad: Wyndham.

V



TO
THE STUDENTS
OF THE
COMMON-LAWS
OF
ENGLAND.



REASON is the life of the Law, Cok. Insti.
tur. 97. b.
*saith that grave Father and sage
thereof, Sir Edward Coke; Nay,*
the Common Law it self is no-
thing but learned Reason, or the
perfection of Reason, gotten by much study and
observation; which by many succession of ages
hath been fined and refined by an infinite num-
ber of grave and learned men, and, by long expe-
rience, grown to such a perfection for the govern-
ment of this Realm, as the old rule may be justly
verified of it; No man of his own private reason
ought to be wiser than the Law. *This Law, as
saith the same Author, consisteth of three parts;*
First, on Reports and judiciall Records: Se-
condly, on Statutes contained in Acts and Re-
cords

Coke Instit.
tut. 334.
Optima Legum & consuetudinis
Interpres est res perpetua
similiter Judicata.
* Coke Institut. 130.

Plowd. Prologue to his
Commentaries.
Coke, Preface to the third
Report.
Hobart Rep. fol. 252.

cords of Parliament, And thirdly on the common Customes of the Realm, grounded upon Reason, and used time out of mind, &c. *The Construction and Explanation of all which belongs to the Judges of the Realm* (* For though the Law is the Rule, yet in it self it is but mute : The Judge is *Lex loquens*) *Whose Judgments and Reasons given in Court, lest they should vanish with the breath that uttered them, or being written in the memorie of the Hearers only, should be more frail and fluid than humane nature it self,* The wisdom of our former Kings appointed four Reporters, to commit to writing, and truly to deliver, as well the words spoken, as the Judgments and Reasons thereupon given in our Courts at *Westminster*, who were chosen men, and conferred altogether at the making and setting forth any book of Reports ; which Book in respect of the number of the Reporters and their approved learning, carried great credit, as justly it deserved, *saith Mr. Plowden.* Hence it is, *That all our Year-Books of Law-Reports, from the beginning of the Reign of King Edward the third, untill the latter end of King Henry the eighth, received their being, and continue their repute with us to this present.* If we have since failed in the number of the persons reporting, it hath been amply recompenced in the Grandure and Authority of one single Author, Sir James Dyer Chief Justice of the Common Pleas, by whose great learning and assiduous study, the said Judgments and Law-Resolutions

solutions have been transmitted and perpetuated untill the twenty fourth year of the reign of the late Queen Elizabeth ; since when there hath not been any continuation or dependance of terme or time in the Lord Cokes Reports, or in any other approved Law-Author, to this present, whereby a constant Series or Diarie of our Law resolutions, in our Courts at Westminster, might have been propagated unto us. By which Interstitium in these licentious times, Non tam Rescripta, & Judicium scita, quam propudia & sæterioris literaturæ impropéria immodicè scaturiunt. A multitude of flying Reports (whose Authors are as uncertain as the times when taken, and the causes and reasons of the Judgements as obscure, as by whom judged) have of late surreptitiously crept forth ; whereby, instead of that plentiful and profitable increase, which those fields (thus by a vigilant husbandman tilled) would have yielded to our Students, we have been entertained with barren and unwarranted Products. Infœlix lolium & steriles avenæ, which not only tends to the depraving the first grounds and reason of our Students at the Common Law, and the young Practitioners thereof, who by such false Lights are mis-led, and thereby their Clients Causes either delayed or miscarried, and multiplicity of Law Suits rather cherished then suppressed : But also to the contempt of our Common-Law it self, and of divers our former grave and learned Justices & Professors thereof, whose honoured and reverend names have in some of the said Books been abused and invocated

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to patronize the indigested crudities of those plagiaries: *The Wisdom, Gravity and Justice* of our present Justices, not deeming nor deigning them the least approbation or countenance in any their Courts, pursuing therein the judgment and practice of the Reverend Sir Henry Hobert, who (when Serjeant Henden, Termin. Mich. 20 Jac. at the Common-Pleas Barr in Godfry Wades Case, vouched for authority Dalisons printed Reports) demanded of him by what warrant those Reports of Dalisons came in print.

Having therefore many, or rather one continued fifty years work by me, of the summary Reports or Commentaries of that grave, pious, and learned Justice Sir George Croke Knight (which he began about the time when the Lord Dyer ended his Reports; and is uninterruptedly continued by him (our Author) untill neer his decease: and) not willing to deprive this present age or posterity of so much good; fearing also least after my decease, they should be obruded to the publique by an incurious Law-hand, or through sordid ignorance of some others, be prostituted in the contemptible Pamphlet-dresse and character of such their blind and mishapen Reports (*dignum patella operculum*) as some of our late Justices and Professors of Law are in that kind abused: * Whereby the very Majesty of the Law

* There be certain legal Formalities

and Ceremonies peculiarly appropriated and anciently continued amongst us; so as they seem now to be essentials of the Law it self, and ought not without the supreme authority be changed or disused: Such are those which are observed by our Author in the creation of Serjeants at Law, &c. And such I conceive are the writing of the Orders and Records of Courts, in such peculiar hands, the printing of Law Reports in their proper Letter and native Language.

is prophaned, the authority of Reports lessened, and the matters in their Books rendred less usefull to our Students. I have taken upon me the resolution and task of extracting and extricating these Reports out of their dark originalls; they being written in so small and close an hand, that I may truly say they are folia sybillina, as difficult as excellent, and have thereunto added the several Tables and Indexes of the names of the Cases, and the chief matters therein contained, I would have sent them forth in their native Idiom, the proper and peculiar phrase of our Common-Law, wherein they are succinctly, sensibly, and fully reported, (There being many words in them so appropriated, as that they cannot be so legally expressed by any other word, or by any periphrasis or circumlocution) if not otherwise by present authority inhibited: And in regard the whole work is too voluminous to be comprised in one Book, I have according to the ancient method observed in our Law Reports, reduced them to the number of our Kings and Queen, in whose Reign taken: and as well in observance of the advise of the Lord Coke to the Students of our Common Law, That they should first read the later Reports, because for the most part the later Resolutions and Judgments are the surest, and therefore best to season them therewith at the beginning, both for the settling of their Judgments, and retaining them in memory, and are easier to be understood than the ancient; As also for that I would in a seasonable time provocare

Cok. Lit. 9.^a

Cok. Lit.
fol. 249.

Tacitus in
vita Julii A-
gric.

ad vivos, upon Tacitus grounds, and not improperly
in his own words, it being now ultra quindecim an-
nos (grande mortalis ævi spatium) in quibus
multi fortuitis casibus interciderunt; pauci, & ut
ita dixerim, non modo aliorum, sed etiam nostri
superstites sumus, exemptis è media vita tot an-
nis, quibus juvenes ad senectutem, senes prope
ad ipsos exactæ ætatis Terminos per silentium
venimus: “above fifteen years (a great part of
“mans age) wherein many have been wasted by usu-
“all chances, a few of us only remaining that have
“overlived, as I may say not only others, but also our
“selves, so many years subducted out of the midst
“of our life, in which we proceeded in silence from
“young men to aged, from aged almost to the grave:
In which space the chiefest both at Bench and Barr
have been taken from us by death, some few only who
were then Antesignani with them, and now primi-
cerii in foro nostro Westmonasteriensi remaining
alive with my self (who for the greatest part of the
time in taking these Reports had the honour to be at
the feet of this Gamaliel) whom I may vouch to at-
test with me the candour and integrity of our Author,
as well upon the Bench, as in writing this work;
wherein he never sought to draw to himself, the glory
of any argument or opinion delivered by another, but
were he at the Barr or Bench, hath faithfully set
down his said Judgmen^t or opinion, and yeelded him
his due commendation. I have therefore first pub-
lished the last part of his Reports, consisting of such
choice Judgements and resolutions only wherein him-
self

self was both Judge and Relator, who without ostentation might have fitly applyed that of Syracides unto himself, Ego ultimus evigilavi, tanquam is qui spicas legit post messores, profeci benedictione Domini, & tanquam vindemiator, implevi torcularis lacum : Considerate, me mihi non soli laborasse, sed omnibus quærentibus eruditionem : "I am awaked up last of all, as one that gathereth after them in the Vintage, in the blessing of the Lord I am increased, and have filled my Wine-press like a Grape-gatherer : Behold I have not laboured for my self alone, but for all them that seek knowledge : To whose worthy memory I think my self obliged, præ-libaminis loco aliquid parentari.

Ecclesiasticus cap. 33. vers. 15. and 16.

This reverend Judge Sir George Croke was descended of an ancient and illustrious Family called le Blount, his Ancestor in the time of the civill dissention betwixt York and Lancaster (as Justice Markham, taking part with King Edward the fourth, was relegated during the reign of King Hen. the sixt ; and as Justice Fortescue, siding with Hen. the sixt, absented himself in the time of King Edw. the fourth, so) being a fautor and assistant unto the house of Lancaster, was inforced to subduet and conceal himself under the name of Croke, till such time as King Henry the seventh most happily reconciling those different titles, this our Ancestor in his postliminium, assuming his ancient name, wrote himself Croke, alias Blount, (that of Blount being altogether omitted by our Judges father upon the marriage

Statut. 14.
H. 8. cap. 8.

age of his son and heir Sir John Croke, with the daughter of Sir Michael Blount of Maple-Durham in the County of Oxon) This Croke aliàs Blount had issue Sir John Croke (Grandfather to our Judge) who being a Six Clerk in Chancery, was restrained marrying, untill enabled by the Statute of 14 Hen. 8. and being in much favor with the King, was by him made one of the Masters of the Chancery. He took to wife the daughter of Sir Ambrose Cave of Leicestershire Knight, by whom he had issue Sir John Croke of Chilton in the County of Buckingham Knight, a man of great modesty, charity, and piety; who in the yeer of Queen Elizabeth was by her made the first High-Sheriff for that County divided from Bedfordshire: He took to wife Elizabeth the daughter of Alexander Unton Esquire, and by her had issue five sonnes, viz. Sir John Croke, Henry Croke, our Author Sir George Croke, Paul-Ambrose Croke, and William Croke. Sir John Croke, eldest Son of Sir John, inherited his fathers virtues and fortunes, and was very famous for his wisdom, eloquence, and knowledge in our Laws: Being Speaker of the Parliament anno 43 Eliz. he received this elogium at the end thereof from her Majesty, That he had proceeded therein with such wisdom and discretion, that none before him had deserved better. He was Recorder of London, and, in Pasc. primo Jacobi Regis, Knighted, and made Serjeant at Law; and, in Termin. Pasch. anno quinto of the said King, advanced by him to be one of his Justices of the then Court of Kings Bench,

Bench, where he so continued untill the twenty third of January, in the seventeenth year of the said Kings reign, at which time he departed this life at his house in Holbourn, leaving behind him a plentiful Estate and Issue. Henry Croke the second Son, and Paul-Ambrose Croke the fourth Son, were grave professors of the Common Law, and the last of them Reader of the Inner-Temple. William Croke, the fifth Son, was a man of an humble spirit; and piously disposed, addicting himself wholly to a Country life.

Sir George Croke the third Son, and Author of this work, was born about the second year of the reign of Queen Elizabeth, and passed over his infancy and tender years under the wings and care of a most discreet and loving Mother, in the exercise of all good qualities, giving thereby very early signs of his future perfection in learning: When time and diligent instruction had made him fit for a remove, he was sent to Oxford, to improve the talent of his naturall ingenuity, with the help of the Arts, and study of Philosophy. After some abode there, he was again transplanted to the Inner-Temple; where he employed the remaining part of his youth in the study of our Common Law, and was double Reader of that house. Upon the twenty ninth of June anno 21 Jacob. he received his Writ of being Serjeant at Law, and the same day was Knighted, and made the Kings Serjeant: Upon the eleventh of February anno 22 Jac. he was created one of the Justices of the Common Bench, and continued in that place untill Mich. Term.

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Term. anno 4. Car. Reg. at which time upon the death of that learned and grave Judge Sir John Doderidge he was advanced to be one of the Justices of the then Kings Bench; from whence I shall take a short survey of him. He was of a most prompt invention and apprehension, which was accompanied with a rare memory, by means whereof, and through his sedulous and indefatigable industry, he attained to a profound Science and Judgment in the Laws of the Land, and to a singular intelligence of the true reasons thereof, and principally in the forms of good pleading. He was of an universal and admirable experience in all other matters which concerned the Common-wealth. He heard patiently, and never spake but to purpose, and was alwaies glad when matters were represented unto him truly and cleerly: he had this discerning gift, to separate the truth of the matter, from the mixture and affection of the deliverer, without giving the least offence. He was resolute and stedfast for truth: and as he desired no employment for vain-glory; so he refused none for fear: and by his wisdom and courage in conscionably performing his charge, and carefully discharging his conscience, and his modesty in sparingly speaking thereof, he was without envy, though not without true glory. To speak of his integrity and for bearing to take bribes, were a wrong to his virtue. In summe, what Tacitus saith of Julius agricola, his wife's father, who was a Governor in our Britain, I may truly say of this * Agricola, our reverend Judge, my wife's father, Agricola temporaria curarum, remissionumq; divisa; ubi conven-

* Tacit in
vita Agrico-
la.
lib. 12. c. 1.

tus ac Judicia poscerent, gravis, intentus, severus,
 & sapius misericors : ubi officio satisfactum,
 nulla ultra potestatis persona, tristitiam & arro-
 gantiam & avaritiam exuerat : Nec illi, quod est
 rarissimum, aut facilitas, auctoritatem, aut seve-
 ritas amorem, diminuit. *“That he well and dis-
 “creetly divided the seasons of his affairs and va-
 “cations : In times of Audience and Judgment he
 “was grave, heedfull, austere, and yet mercifull too :
 “That duty performed, no face any more or shew of
 “authority; severe and stately looks were laid apart
 “in such sort, that neither his gentle and courteous
 “behaviour weakened the reverence, nor his seve-
 “rity the love due to his person : He was of a strict
 life to himself, yet in conversation full of sweet de-
 portment and affable, tender and compassionate,
 seeing none in distress, whom he was not ready to re-
 lieve : nor did I ever behold him do any thing more
 willingly than when he gave almes : He was every
 way liberall, and cared for mony no further than to
 illustrate his vertues : he was a man of great modesty,
 and of a most plain and single heart, of an ancient
 freedome and integrity of minde, esteeming it more
 honest to offend than to flatter, or hate : He was re-
 markable for hospitality, a great lover and much be-
 loved of his Country, wherein he was a blessed peace-
 maker, and in those times of conflagration was more
 for the Bucket than Bellows, often pouring out the
 waters of his tears to quench those beginning flames
 which others did ventilate : In Religion he was de-
 vout towards God, reverent in the Church, attentive*

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at Sermons, and constant in Familie duties. Whilest he lived, he was the example of the life of faith, love, and good works, to so many as were acquainted with his equall and even walkings in the wayes of God, through the severall turnings and occasions of his life: and though now dead, still continues to do good, being the founder of a Chappell, which he caused to be dedicated and set apart for the service and worship of God, and for the ease of the Inhabitants of Studeley (being an Hamlet and Member of Bechley in Buckinghamshire, and at least two or three miles distant from that Parish Church) as also of an Hospitall for poor People, both which he endowed with a liberall revenue. At last this pious and learned Judge (finding his Age and Infirmities to increase, and being desirous, before he put off his decaying and declining body, to have some leisure to examine his life, and to prepare for that great day wherein all must render an accompt to the supreme Judge of their Actions) was an humble suitor to the late King for his Writ of ease, which was denied and yet in effect granted: And for the rareness, I shall recite both Petition and Answer, which are as followeth, &c.

To

To the Kings most excellent Majesty.

*The humble Petition of your Majesties humble
Servant Sir George Croke Knight, one of the
Justices of your Bench,*

Humbly sheweth,

THat he having by the gracious favour of
Your Majesties late Father of famous me-
mory, and of Your Majesty, served Your Ma-
jesty, and your said late Father, as a Judge of
your Majesties Court of Common Pleas, and of
your Highness Court called the Kings Bench,
above this sixteen years, is now become very old,
being above the age of 80 years: And by
reason of his said age and dullness of hearing, and
other infirmities, whereby it hath pleased God
to visit him, he findeth himself disabled any lon-
ger to do that service in your Courts, which the
place requireth, and he desireth to perform; yet
is desirous to live and die in your Majesties Fa-
vour.

*His most humble suit is, That your Ma-
jesty will be pleased to dispence with
his further attendance in any your
Majesties Courts; that so he may re-
tire himself and expect Gods good plea-
sure: And during that little remain-
der of his life, pray for Your Majesties
long Life and happy Reign.*

GEORGE CROKE.

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The

The Kings Answer.

UPon the humble address, by the humble
Petition of Sir *George Croke* Knight, who
after many years service done both to Our de-
ceased Father and Our Self, as Our said Fathers
Serjeant at Law, and one of His and Our Judges
of Our Benches at *Westminster*, hath humbly be-
sought Us, by reason of the infirmity of his old
age (which disableth him to continue to per-
form to Us that service, he much desireth to have
according to his duty done) his further atten-
dance might be by Us in Our Grace dispensed
with; to the end all Our loving Subjects, who
have, and shall faithfully serve Us (as We de-
clare this Our Servant hath done) may know,
That as We shall never expect, much less require,
or exact from them performances beyond what
their heakths and years shall inable them; so
We shall not dismiss them without an appro-
bation of their service, when We shall find they
shall have deserved it, much less expose them
in their old age to neglect. As Our Princely
testimony therefore, That the said Sir *George
Croke* being dispensed withall, proceeds from
Us, at the humble request of the said Sir *George
Croke* (which We have cause and do take well,
that he is rather willing to acknowledge his
infirmity, by his great Age occasioned, than
that by the concealing of the same any want
of

of Justice should be to Our People) and not out of any Our least displeasure conceived of him; do hereby declare Our Royall pleasure, That We are graciously pleased, and do hereby dispense with the said Sir *George Crokes* further attendance in Our said Bench at *Westminster*, and any Our Circuits. And as a token of Our approbation of the former good and acceptable service, by the said Sir *George Croke*, done to Our deceased Father and Our self; do yet continue him one of Our Judges of Our said Bench: And hereby declare Our further will and pleasure to be, That during his, the said Sir *George Crokes* life, there shall be continued and paid by us unto him, the like Fee and Fees as was to him, or is, or shall be by Us paid to any other Our Judges of Our said Bench at *Westminster*, and all Fees and Duties, saving the allowance by Us to Our Judges of Our said Benches for their Circuits only.

Soon after, this good Judge (having been an early laborer in the Lords husbandry, and endured the heat of the day till the eleventh hour, whereby he obtained the promised penny of this life, which wisdom hath in store for her children, viz. length of dayes on his right hand, and on his left riches and honour) made an holy retreat to his house at Waterstoke in Oxford-shire; where, full of assurance that Christ would be unto him in death advantage, he not long after cheerfully resigned up his Soul into

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the hands of him that gave it. And upon his Tomb, there erected, at the charges of his virtuous Lady and Relict, Mary, the Daughter of Sir Thomas Bennet Knight, for the lasting memory of his name, whose service deserved the favor of his Prince and Country, there is this Inscription :

Georgius Croke Eques Auratus, unus Justiciarium de Banco Regis, Judicio linceato & animo presenti insignis, veritatis hæres, Quem nec minæ nec honos allexit : Regis autoritatem & populi libertatem æqua lance libravit ; Religione cordatus, Vita innocuus, manu expansa, corde humili pauperes irrogavit ; Mundum & vicit & deseruit anno Ætatis suæ LXXXII. Annoq; Regis Caroli XVII. Annoque Domini MDCXLI.

Whereunto I shall subjoyn

*Horat. lib. 1.
Ode 24.*

———Cui pudor, & Justitiæ soror
Incorrupta fides, nudaq; veritas :
Quando ullum invenient parem ?

———“ Unto whom both Modesty,
“ And Justice Sister (Faith, from Scandall cleer)
“ And naked Truth : When will they find a peer ?

Concerning

Concerning the whole work it self, I may, I think, and not immodestly, use the words of the Roman Preco proclaiming the Ludi seculares, Venite & videte quod nemo mortalium vidit aut visurus est, A work of our Law-Reports by one man taken and continued beyond a Jubile: whereof this part contains the Cases of so late time, that thereby it hath the advantage of former opinions concerning most of the Queres controverted in the elder Books giving a resolution to many of them: And hath also cleerly explained several of our late Statutes, delivered divers most exact Rules for pleading; and carefully set down all legall formalities in the creation of Serjeants at Law, Judges, &c. with other the Ceremonies and Orders of their precedency, their times of sitting in Court, keeping of Essoynes, adjournment of Terms, and other such ancient Rights & usages of our Common Law; whereby the honor and very being thereof hath been preserved. Of all which I would reminde our Student of the observation, which is given him by Sir Edw. Coke, That there is no knowledge, Coke Lit. fol. 9.^a Case, or point in Law, seem it of never so little accompt, but will stand him in stead at one time or other; and therefore, in reading, nothing to be pretermitted.

The method herein used is likewise considerable; not being stuffed with the Pleadings at large, and their many continuances, with the same Arguments at Bar and Bench reinforced pro & contra: But here the Case is shortly stated according to the points
in

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Julius Solinus in Epist.
Polyhist. inscripta.

Plowd. Prologue to his Commentaries.

Cok. Lit. 370. 209. 217.

Plowd. Prologue, &c.

in Law, therein to be discussed and adjudged, the reasons plainly & succinctly laid down, & yet the matter intended truly uttered, and as neer as may be, in the name and words of the party who deliver'd it, and the former Authorities to warrant the same summarily vouched; so as the Book is (ad compendium præparatus quantumq; ratio passa est; ita moderate repressus, ut nec prodiga sit in ea copia, nec damnosa concinnitas) already abridged, and as far as the subject matter will permit, equally ballanced; so as neither its affluence shall cloy, or its conciseness be a loss to our Students. This Book also passeth in surety of Law, most of our former Reports, which were chiefly composed of the sodain speeches of the Justices, upon the motion of Cases by the Serjeants and Counsellors at the Barr: But most of the Cases herein, be matters in Law, tryed upon Demurrer, or by special Verdict, containing matters in Law, which both were debated by those of the Bar & Bench to the uttermost; and in the end allowed, or for the causes shewn, disallowed, and whereof the Author himself had a Copy, studyed, argued, and after great deliberation, gave his Judgment or resolution in every of them: And so they be most firm and sure to trust unto.

And whereas it is the advice of Sir Edw. Coke to Students, That they should look not only to the Cases reported; but unto the Records of the Pleadings and Judgments therein, which much confirm the credit of the Report, and the Readers surety of the Law. In most of the Cases here reported,

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reported, the number, Roll, when, and where entred, is prefixed; that thereby if any scruple or doubt of Error should be in the Report, the Student might have a ready recourse thereunto: And herein also I shall further secure you, that as already before the publishing hereof, most of the present Justices have had a perusal of the Authentick and original Manuscript-books of these reports, composed in their genuine language: So when the rest of them for the publick good shall either in their original, or by translation be made common, I shall with the same care and reverence, like another Pysane letter, preserve them, as choice Monuments of his great prudence and unwearied industry that collected them; and will be ready at any time hereafter to produce them for proof or confirmation of what I have or shall publish out of them, when by the honourable Justices, or upon any important occasion, I shall be thereunto required.

* The Emperors from Justinian, who died 565. untill Lotharius 11. in the year 1125. so much neglected the body of the Civil Law, that all that time

none ever professed it: But when the Emperor Lotharius the eleventh took Amalfi, he there found an old copy of the Pandects or Digests, which as a precious Monument he gave to the Pisans; by reason whereof it was called *Litera Pisana*: From whence it hath been since translated to Florence, &c. and is never brought forth but with Torch-Light, or other reverence. *Carin. Cron. lib. 4. fol. 438. Seldens Annotations upon Fortescue, fol. 20. 21.*

I shall not need to apologize for my self in making publick these Reports, wherein I had the only propriety, by the free donation of the Reverend Author: The work I hope will not need it. If I find this acceptable, I shall cheerfully give birth to the other volumes of this eminent Person. For as it is my comfort (That God hath vouchsafed;) so it shall be my endeavour, that I may any way (though

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*(though but thus instrumentally) use my hand in
the least service tending to a generall good: Det
Deus ut perficiam.*

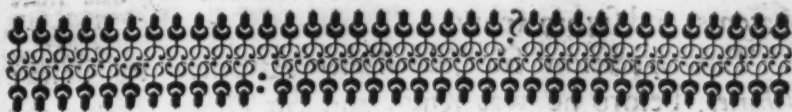
From my Manor house of Gorbambury,
May 7. 1657.

HAREBOTLE GRIMSTON.

Hæc studia Adolescentiam alunt, Se-
nectutem oblectant, Secundas res
ornant, Adversis perfugium præ-
bent; Delectant domi, Non im-
pediunt foris, Pernoctant nobis-
cum, Peregrinantur, Rustican-
tur.

Cicero pro Archia Poeta.

Anno



Anno primo

CAROLI

REGIS.



King JAMES departed this life upon the twenty seventh day of *March*, in the year of our Lord God 1625. By whose dimise, all the Justices Patents became void : Whereupon King *Charles* signified his pleasure to the Lord Keeper That all in judicial places should retain them, as before, and be new impowred ; And accordingly Sir *Randolph Crew*, chief-Justice of the Kings-bench, received a new Writ ; And Sir *Henry Hobert* chief-Justice of the common-Bench a new Patent, and were sworn *de novo*. The same day also Sir *Thomas Coventry*, Attorney-general, and Sir *Robert Heath*, Solicitor-general to the late King, had new Patents sent them, and were again sworn. And like Patents were made for the other Justices, with recital of their severall places (as they were in antiquity) and of their Removes or changes. Justice *Jones* was sworn one of the Justices of the Kings-Bench, and my self, at the same time, at the Lord Keepers house, was sworn (again) one of the Justices of the Common-bench ; And afterwards the other Judges, as they came to *London*, took their Oathes and received their Patents ; and although there had been a Proclamation made That all the Judges might hold and execute their severall Offices as formerly ; yet we conceived it safest That none of us should

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intermeddle untill we were re-Authorized by our new Patents, and sworn anew.

This vacation Sir John Walter Attorney to Prince Charles, before he was King, and Sir Thomas Trevor the said Princes Solicitor, were appointed the Kings Serjeants, and Writs directed unto them retornable in *Chancery*, who thereupon, in the vacation, appeared before the Lord Keeper at his house in *Westminster*, and there took the Oath for Serjeants, and then also sworn the Kings Serjeants, and their Patents there delivered them. Afterwards Sir Henry Telverton received a Writ to be Serjeant, retornable in *Chancery* the fourth day of May (which was the first day of the Term) with a Warrant also to be one of the Justices of the Common-bench, and thereupon he made suite to the Chief-justice, That he might have his Robes and Coyse put upon him in the Treasury of the Common-bench, and be dispensed with for returning in his party-coloured Robes from Serjeants Inne to *Westminster*, as the manner is of new Serjeants: Upon this occasion all the Justices and Barons met at Serjeants Inne, by appointment of the Chief-justice, where Sir Henry Telverton then shewing the reasonableness of his request (because by the suddenness of his calling he was unprovided for the solemnities) cited a president, viz. That Sir Edward Coke being Kings Attorney, was made Serjeant and Chief-justice of the common-Pleas, and sworn in *Chancery* the same day, and then his Robes and Coyse being put on in the Treasury of the common-Bench, by Sir John Popham, Chief-Justice, and by Sir Thomas Flemming Chief-Baron, he was led in his party Robes to the Common-Bench barr to make his Count, and there took the Oath of Chief-Justice all in one day. And he likewise desired, that so it might be done to him, but all the Justices conceived it was not a president to be followed, being part of the ceremony for the creation of Serjeants, which ought to be performed in solemn manner; Nor could it be convenient to suffer any more such examples. Therefore

fore they all resolved, That the writs of the said Serjeants retornable *immediate* to appear in the vacation, and then swear them at the Lord Keepers house, was not legall and according to the course of Law : For although the *Chancery* be alwayes open to purchase general writs, or try matters of equity, to have writs retornable *immediate*, yet this Writ, which is of so high a nature as to command *ad comparandum & recipiendum Statum, & gradum servientis ad legem*, ought to be made retornable at a day certain in Term, and not in the Vacation when a day cannot be prefixed (as of necessity ought to be) for the performance of all the ceremonies requisite for that calling : Whereupon they moved the Lord Keeper to have other writs directed unto them, to take the said estate and degree, retornable in *Chancery*, May the 4. being the first of this Term, which was done accordingly, and they sworn there by agreement amongst themselves in this order. First Sir John Walter, who had a warrant to be the Kings Serjeant, and appointed to be chief-Baron (in the place of Sir Laurence Tanfield, who dyed the 30 of April before) Then Sir Henry Tolverton, who had been the Kings Attorney, and was ancient to them both, and lastly Sir Thomas Trevor, who had also a Patent to be the Kings Serjeant : And on Tuesday, May 10. in the second week of the Term, the said Sir John Walter being of the inner Temple ; Sir Henry Tolverton of Grayes Inne, and Sir Thomas Trevor of the inner-Temple, with the Benchers, Readers, and others of those Inns of Court, whereof they respectively had been, being attended by the Warden of the Fleet and Marshal of the Exchequer, made their appearance at Serjeants Inne in Fleet-street, before the two chief-Justices, and all the Justices of both Benches. And Sir Randolph Crew, chief-Justice, made a short speech unto them, and (because it was intended they should not continue Serjeants to practise) he acquainted them with the Kings purpose of advancing them to seats of Judicature, and exhorted them to demean themselves well in their several places. Then every one in his order made his Count (and defences were

were made by the ancient Serjeants) and their several Writs being read, their Coyfs and scarlet-hoods were put on them, and being arrayed in their brown-blew Gowns, went unto their Chambers, and all the Judges to their several places at *Westminster*, and afterward the said three Serjeants, attyred in their party-coloured Robes, attended with the Marshal and Warden of the *Fleet*, the servants of the said Serjeants going before them, and accompanied with the Benchers and others of the several Inns of Court, of whose society they had been, walked unto *Westminster*, and there placed themselves in the Hall over against the Common-pleas bar.

And, the Hall being full, a lane was made for them to the barr; then (the Justices of the Common-Bench being only in Court) they recited there several *Counts* (and several *defences* made to several *Counts*, and had their Writs read. The first and third by *Brownlowe* the chief Prothonotary, and the second by *Goulston* the second Prothonotary. And Sir *John Walter* and Sir *Thomas Trevor* gave Rings to the Judges with this inscription, *Regi Legi servire libertas*. And Sir *Henry Telverton* gave Rings, whereof the inscription was *Stat Lege Corona*, and presently after (they all standing together) returned to Serjeants Inn, where was a great Feast, at which Sir *James Lee*, Lord Treasurer, and the Earl of *Manchester*, Lord President of the Council were present.

And upon Thursday the twelfth day of May, Sir *Henry Telverton* was made Justice of the Common-Bench (being the fifth Justice) and the same day Sir *John Walter* was sworn chief-Baron, and Sir *Thomas Trevor*, one of the Barons of the Exchequer.

Termino



Termino Paschæ anno primo Caroli Regis
in Communi Banco.

Hamond *versus* Dod.



DE B T, upon an Obligation conditional, reciting
whereas such Copy-hold Lands were to be sur-
rendred by A. S. at her full age, to the use of
the said Hamond and Gay, and their heirs, and
that Gay should pay to Hamond thirty threë
pound at such a day, and if he failed it should
be to the use of Hamond and his heirs. It
was conditioned, That if the said Obligor procured the said
A. S. at her full age to surrender to the use of Hamond and his
heirs, and if Hamond and his heirs might have and enjoy the
said Lands to him and his heirs, That then, &c. The Defendant
pleaded that Gay did not pay the thirty threë pound, and that the
said A. S. came of full age such a day, and afterwards at such
a Court, in full court, did surrender, release and quit claim, to
the now Plaintiff, being in possession, all her right, estate and inte-
rest in the said Tenements, &c. and that the Plaintiff alwaies af-
ter might have enjoyed the said Tenements, &c. The Plaintiff
replyeth, Quod bene & verum est, That the said A. S. did surrender
&c. prout. But that afterward, (viz. on such a day) the said Gay en-
tered and expelled him, &c. Whereupon the Defendant demurres :
And now this Term, it was moved by Aches Serjeant, That
this Replication was good, without shewing that the Expulsion
was for title ; because by the Obligation he hath taken upon him-
self, to defend against all titles : Vid. 2. Edw. 4. fol. 15. If a Replica-
on be not good, yet if the barr be ill in substance, Judgement shall
be for the Plaintiff : Vid. Coke 3. Rep. fol. 52. Ridgway's case. But
it was resolved, That this Replication is not good, because he hath
not shewn that he was evicted by lawful title. For otherwise the

Bond doth not extend unto it : Vid. 15. Eliz. Dyer. fol. 225. & 26. Hen. 8. fol. 3. It was also held, That the Barr (that the surrendered and released in Court,) is good and certain enough, according to common intendment. And although it be not said, that the surrendered to the use of the Plaintiff ; yet being alledged, to be surrendered and released in Court, and accepted by the Plaintiff, and confessed in the Replication, It was a surrender to the use, &c. and good enough, &c.

Holme *versus* Lucas.

2. **A**ssumpſit. The Declaration and ~~Writ~~ it were, Quod cum indebitatus fuit to the Plaintiff, in fifteen pounds. In consideration whereof, he assumed to pay unto the Plaintiff the said fifteen pounds, &c. The Defendant pleaded, Non assumpſit, and found for the Plaintiff ; and now moved in arrest of Judgement, That this Declaration is not good, because it is generally, Indebitatus assumpſit ; and doth not shew for what cause, viz. for merchandise sold, or money lent, or for other causes which lye in contract : for if it were Indebitatus by judgement, or by specialty, which lyes not in contract, an Assumpſit in consideration thereof would not lye ; because damages recovered in an Assumpſit, cannot be a barr to a debt upon a record or specialty. Headen Serjeant for the Plaintiff agreed, That such a Declaration had not been good, if the Defendant had demurred unto it : but having now pleaded Non assumpſit, and the Jury having found Quod assumpſit : It shall be intended, That he assumed for such a debt which lyes in Assumpſit. And therefore the Defendant hath made his Declaration good ; and as to this point, divers presidents have been in this Court, That after verdict, it hath been held good : And the Plaintiff had judgement ; and many presidents were alledged to have been the other way, in the Kings Bench and Exchequer Chamber : Whereupon it was appointed, That presidents on both sides should be searched. And in the mean time, Curia advisare vult.

Arscott *versus* Heale, in the Exchequer Chamber.

3. **E**rror of a Judgement in the Kings Bench, in debt, upon an Obligation of two hundred pounds, conditioned for the payment of one hundred pounds by John Arscott, John Chichester, and John Vigniers, or any of them. They being all jointly and severally obligors : The Defendant John Arscott pleads, That he paid it at the day. The Plaintiff replies, That neither the said John Arscott, John Chichester, nor John Vigniers, nec eorum aliquis had paid the said hundred pounds at the day, Et hoc petit quod Inquiram, & prædictus Johannes Arscott similiter. The Jury found, That the foresaid John Arscott had not paid the said hundred pounds, as the Defendant had pleaded ; and thereupon Judgement was given for

for the Plaintiff: And the Error assigned, was, because the Verdict was not according to the issue; For it might be paid by any of the others, which had sufficed. But the Court held it to be well enough: For the Addition of John Chichester and John Veigners, (not mentioned in the barr) was but surplusage: And their finding that John Arscott did not pay the money, is sufficient. And it shall not be intended, that any of the other two had paid it, when the Defendant saith that he himself paid it. And if it had been proved, that any of the other two had made the payment, the Jury should have been directed to find, that the Defendant had paid it by such, &c. Whereupon Judgement was affirmed.

Saverne versus Smith, in the Exchequer Chamber.

ERror of a Judgement in an Ejectione Firmæ, upon a special Verdict, the case was, That John Dix, being a Coppelholder in fee of the Manor of Swaffling, had issue two daughters, Agnes married to John Smith, and Margaret married to William Reve, and dyed seised: William Reve made a lease for ten years of Margarets part, without licence, and against the custome of the Manor: Which being presented by the homage, as a forfeiture, the Lord seized upon it, and granted it to the said John Smith and his heirs. Afterward William Reve dyed, having issue Nicholas, who entred and let to the Plaintiff, for three years. The Plaintiff entred, and was ejected by the Defendant, who claims under the said John Smith. Et si super totam materiam, &c. The Judgement was entred, pro eo quod videtur Curie, That the Defendant was guilty of the trespass and ejection aforesaid, modo & forma predicta. as the Plaintiff hath declared. Ideo consideratum est, That he shall recover his damage aforesaid, &c. The Error assigned in Law was, First, That Judgement is given for the Plaintiff, where it ought to have been given for the Defendant. Secondly, Because the Judgement is for the ejection de integris tenementis, where it ought to have been but of the moiety. For the matter in Law, the case is, A Coppelholder in fee takes husband, who makes a lease for years, which by the custome of the Manor, is a forfeiture. The husband dyeth: Whether this forfeiture shall bind the Feme and her heirs, after her husbands death? And it was adjudged, it should not bind; but that the Feme shall have it again, after her husbands death, notwithstanding the forfeiture. Achoe Serjeant said, That for the first point, he would not insist whether it were error or no. For he conceived the second to be a manifest error; because the Plaintiff had no colour to have an Ejectione firmæ, but for a moiety only. And the Judgement was given for the whole and intire Damages, assessed by the Jury. Whereupon Curia advisare vult.

Flight

Flight *versus* Crafsden.

5. **A** Sumpsit, Whereas the Plaintiff was obliged to the Defendant in an Obligation of sixty pounds, to pay thirty the 9. day of May 1624. That the Defendant, the said 9. of May, in consideration the Plaintiff would pay unto him the said 30. li. upon the said 9. of May, promised to deliver the said Bond to be cancelled, And alledged in fact, that he paid the said 30 li. to the Defendant according to his promise, and that the Defendant had not delivered him the said Bond to be cancelled, but refused, and had caused him to be arrested thereupon, to his damage, &c. The Defendant Protestando that he made not any such promise, pro placito dicit quod non solvit, &c. whereupon they were at issue, and being found for the Plaintiff, Gwin Serjeant moved in arrest of Judgment, That this is not any consideration to charge the Defendant. For he received but his money at that instant time, and consideration ought always to be matter of profit & benefit to him to whom it is done, by reason of the charge or trouble of him who doth it. Otherwise it is not a sufficient ground for a promise, and so the Action lies not; And for proof hereof, he cited 9 Edw. 4. fol. 19. But Richardson Serjeant for the Plaintiff shewed, That it is consideration sufficient to have it paid without suit or trouble; for peradventure the non-payment at that time would be more prejudicial unto him, than the forfeiture of the Bond would be of advantage, if he should be forced to sue for it. And he promised to do nothing, but that, which in honesty and equity he ought to do, (viz. to deliver up the Bond upon payment of the money) which promise is binding. And of that opinion was all the Court, for the reasons before alledged. And Hobert said, if he had promised in this case, That if he would pay the money in the morning of the said day, he would give him five pounds, it had been a good promise, because the money was paid before Sun-set, (the time when the law appoints it to be paid;) And it was adjudged for the Plaintiff. Harvey & Yelverton absentibus.

Sr. Upwell Caroons case.

6. **S**ir Upwell Caroon, an alien born, and not made Denison, (being Agent here for the States of the Low Countreys,) dyed intestate. And now contestation was made to whom Administration should be committed. For the Judge of the Prerogative offered to commit it to three of his brothers and sisters children, who were aliens born, and lived in the arch-Dutchels countrey. But one who was Grand-child of his sister, born in England and inhabiting here, endeavouring to obtain it, moved, That of right it appertained unto him, being a Denison; because the estate consisted in Leases for years, of lands, and personal estate in debts, and that Aliens may not have Leases for years, although they may have personal

personal things, and therefore prayed a Prohibition, Sed Curia advisare vult. Afterwards in Michaelmas Term, being again moved, It was resolved by the whole Court, That no Prohibition was grantable: For an Alien may be Administrator, and have Administration of Leases, as well as of personal things, because he hath them in anothers right, and not to his own use, And he may be Administrator as well as a person Outlawed or Attainted may be an Executor; And this Court hath no authority about committing Administrations, &c. Pasch. 41. Eliz. rot. 1704. Beck versus Philipps. Debt brought by an Administrator. The Defendant pleads that the Plaintiff was an *Alien nec*, adjudged *Quod Respondere onfer*.

Doctor Brikendens Case.

Prohibition was prayed, because upon prosecution in the spiritual Court for Tythes, Sentence was against the Defendant, and an Appeal sued thereupon, and Doctor Brikenden made thereby a party as promotor of the suit, who was not any party thereto; And herein the first Sentence was confirmed, and this was in November 1623, and costs were then awarded to Doctor Brikenden, but not taxed untill Hillary term 1623. that is to say, between the time of awarding the costs, and of taxing the same came the Pardon, which pardons all offences before December 1623. whereby this offence, and the costs taxed thereupon (as was pretended) although they were awarded in the spiritual Court before the said Pardon, were also pardoned; and because it was not there allowed, A Prohibition was prayed; but denied. For those Costs being awarded to the party before the Pardon, although they be taxed afterwards, be not taken away by that Pardon.

Marshall's Case.

Ejectione firmæ. After imparlance the Defendant pleaded *Auncient Demesne*, and it was thereupon demurred; For being after Imparlance it came too late: But the Court doubted thereof, because such land is not impleadable at the common-Law, and therefore it came timely enough when he had not pleaded any other Plea. Sed Curia advisare vult.

Termino Trinitatis, anno primo *Caroli* Regis,
in Communi Banco.

Lionell Farringtons case.

1. **D**Ebt was brought upon the Statute of 23 Elizab. Reginae against Thomas Prince and his wife, Ad respondendum 120. l. for the Refusancy of his wife, and absence from Church for eleben moneths, viz. from the twenty third of September, viceffimo primo Jacobi, unto the day of the writ : per quod, Actio accrevit eidem Domino Regi, & Lionello Farrington ; qui tam, &c. ad habendum the said 120. l. Upon this Declaration the Defendant demurreth ; pro eo quod Declaratio ipsius Lionelli minus sufficiens, in Lege existit ad ipsum Lionellum, qui tam, &c. versus ipsum Thomam manutenendum, &c. unde petit Judicium. Et quod prædictus Lionellus, qui tam, &c. ab Actione sua prædicta versus eos habendum præcludatur. Et prædictus Lionellus, qui tam, &c. ex quo ipse sufficientem materiam in lege, ad Actionem prædictam versus eos manutenendum, superius declaravit, &c. And they joined in demurrer ; which being entred in Hilary Term ; King James departed this life in the vacation following ; and it was moved in Easter Term, whether the original Writ, Declaration, Pleading and Demurrer upon that Action being brought by the Informer for the King and himself, should be abated by the demise of the King, as an original brought by two, where, by the death of either, the Writ shall abate ; or as Writs original brought by the King, in his own name only ; as it is in Cok. 7. Rep. fol. 30. Or whether the Writ and Declaration only shall stand, and not be discontinued, as it is resolved in the said case : Or whether the Writ and Declaration, and all proceedings thereupon shall stand by the Statute of primo Edward. 6. capite septimo, as it shall do in Writs of debt, betwixt common persons : And because no president had been produced in such cases, and many presidents were, that those only should stand : But all Demurrers and Pleadings to informations were determined : The Court advised untill this Term, and ordered, That presidents should be searched, to know what had been done in Actions of debt upon penal Statutes, brought by information for the King and party. And now being moved again, and informing, That there could not any presidents be found, and that such Writs upon that Statute had not been frequent, but of late : The Court resolved, That this Writ and Declaration, with all the proceedings thereupon, should stand : For it is marly the suit of the party, and within the Statute of primo Edward. 6. which shall not be discontinued or abated

bated. For although the Writ be, *Quod reddat Domino Regi, & Informatori*; yet it is presumed for himself, he being as the original party only; For the Statute appoints, That no protection or wager of Law shall be therein; And the pleading upon this Writ shews as much; viz. That the Plaintiff Farrington shall maintain his Action; And That the Declaration is not sufficient to compel him to answer to the informer, never mentioning the King. And the Replication and joyning in demurrer is only by the informer; viz. That it is not sufficient to barr him of his Action: Whereupon they all resolved, That not only the Writ and Declaration, but all pleadings thereupon and the demurrer should stand. *Ld. Cok. Rep. 7. fol. 30. Dy. 125. 6. Edw. 6. Fitzherbert Nonsuit. 13.*

George Venables case.

This Term a Writ of Priviledge was signed by all the Justices of the Common-Bench, for George Venables a Clerk under the Custos Brevium, to free him from being a Souldier, reciting, That it is the custome and priviledge of the Court, time whereof, &c. That neither the Attorneys nor Clerks of the Court shall be pressed for Souldiers, nor elected to any other Office sine voluntate sua, but ought to attend the service of the Court, vide the Lord Coks book of Entries. fol. 436. where the like Writ of priviledge was granted to a Clerk of the Kings-bench, to discharge him from being pressed for a Souldier.

Note That upon Monday the twentieth of June this Term, being the first day of *Ostaviu Trinitatis*, A Writ of Adjournment was delivered to the Justices to adjourn the two Returns of *Ostaviu Trinitatis*, & *Quindena Trinitatis*, usque tres septimanas post Trinitat. Which was *die Luna* the last week; And that all pleas and process, and all Returns of Sheriffs should be adjourned to that Return. And the Writ was dated the *eighteenth day of June*, which was *die Sabbati* in the first Return: Which mentions, That whereas the Pestilence much increased in London, the Suburbs and parts of *Westminster*; And if the Subjects of all parts of the Realm should resort hither for law causes, it would be very dangerous to increase the Sickness, to the perill of the Kings Person, and of forraign States resorting unto him. Therefore the King, by advice of his Council and Judges, &c. had appointed, &c. And thereupon Proclamations issued, bearing date the *eighteenth day of June, anno primo Caroli Regis*; signifying the Kings pleasure to adjourn these two Returns untill the last Return; And that the last Return should be held only for continuance of Causes and Process, and for the Joyning of Issues; but that no proceedings should be upon demurrers, or special verdicts; nor any Judicial hearings in any of the Courts of *Chancery, Starr-Chamber, Courts of Wards, Court of*

Requeſts, Dutchy, or Exchequer Chambers: And that no perſons ſhould be compelled to appear in perſon, but by Attorney, with a proviſo, That all Accountants and parties appointed to pay Money into the Exchequer, ſhould hold their dayes in the Exchequer to account. And thereupon the Juſtices of the Kings-Bench, Common-pleas, and Barons of the Exchequer, ſate in their ſeveral Courts, and heard divers motions in their reſpective Courts (but none upon any demurrers or ſpecial verdicts) and ſo continued untill eleven of the Clock that morning: And then in the Common-Bench, the Writ of Adjournment (enſealed and incloſed in wax, with the great patent Seal) was opened; and three Proclamations made to hear the Writ of Adjournment read; which being done, the Cryer rehearſed the effect of the Writ of Adjournment in Engliſh; that all Pleas, Proceſs and Appearances thereunto, were adjourned untill *tres Trinitates*: And then the Court roſe without doing ought elſe: Nor were there any Eſſoyns or proceedings made upon that Return. And upon Monday in *tres ſeptimanas Trinitatis* (being the day of Eſſoyns of the ſaid return) the day following, and the laſt day of the Term, the Court ſate again, and heard all motions; but none upon Demurrers, or ſpecial Verdicts, by reaſon of the Proclamation aforeſaid. And all Recoveries, Fines and motions for proceeding to Tryals, were as if it had been in full Term. *Vide Trin. 4. Edw. 4. fol. 20. Trin. 11. Edw. 4. fol. 37. Trin. 21. Ed. 4. fol. 37. Mich. 5. & 6. Elizab. Dyer 225.*

Termino

Termino Michaelis, anno primo *Caroli* Regis, in
Communi Banco, apud Reading.

THe King by Proclamation three weeks before the beginning of Michaelmas Term (in respect the Sickneſs continued ſo great at *London*, and the parts thereto adjoining) ſignified his pleaſure, That the ſaid Term ſhould be adjourned from *octabis Michaelis*, untill *menſe Michaelis*: And, on the firſt day of *octabis Michaelis*, Juſtice *Yelverton* (quiſny Judge) had a Writ to adjourn accordingly; it being his turn to keep the Eſſoynes. And like Writs of Adjournment were directed to the Juſtices of the Kings-Bench, and Barons of the Exchequer: And the quiſny Judge, and Baron of every Court came to *Weſtminſter*, the firſt day of the Return (being the day of Eſſoynes) and read the Writ of Adjournment of their Courts only; and did nothing elſe. And at *menſe Michaelis*, the Juſtices of every Court had other Writs directed unto them, to adjourn, untill *Craſſino animarum*, to *Reading*. And the King, by Proclamation bearing date the eleventh day of October, ſignified his pleaſure, That his Courts of *Chancery*, *Requeſts*, *Wards*, *Starr-Chamber*, *Dutchy*, and *Receipt of the Exchequer*, ſhould be there held. And accordingly the firſt day of *menſe Michaelis* (which was the day of Eſſoynes) the quiſny Judges of all the Courts of the Kings-Bench, Common-pleas and Exchequer, came to *Weſtminſter* and read the ſaid Writs; and adjourned the Term unto *Reading*.

IN the mean time, *viz.* upon the twenty ſeventh day of October, *John Williams* (Biſhop of *Lincoln*) Keeper of the great Seal, was diſcharged of his place. And upon the thirtieth of October, being Sonday, Sir *Thomas Coventry* of the *Inner-Temple*, Knight, the Kings Attorney, was made Keeper of the great Seal. And the ſame day Sir *Robert Heath*, the Kings Solicitor, was made Attorney-General: And *Richard Sheldon* made Solicitor, and Knighted; both being of the *Inner-Temple*.

UPon *Craſſino animarum*, being Thursday, and the day appointed by the Statute of 9 *Edw.* 2. for the Chancellor, Treafurer and Judges meeting in the Exchequer, to nominate perſons to be made Sheriffs for all Counties, It was much doubted whether all the Juſtices were to come thither, it being the day of Eſſoynes, and to fit in Court; or whether they might ſtay untill *quarto die poſt*; And that one of them only ſhould come the firſt day to keep the Eſſoynes. And by reaſon of the ſhortneſs of the time from the change of the Lord Keeper, it was appointed by the King, That the day of the billing of Sheriffs ſhould be deferred from the uſual day; and that all the

Justices, besides the three puisny Justices (who were to keep the Essoynes) should not come untill Saturday ; And that no Court should sit untill Monday ; For they held That the *quarto die post* of the Return is properly the day for sitting, and not before, although it be after Adjournment : as it were the Term begins without Adjournment.

4. **U**Pon the Tuesday following, all the Justices were assembled at the Lord Keepers house, to be conferred withall, whether it stood with Law, or was convenient to grant an *Habeas corpus* to the Warden of the Fleet, or to the Marshal, by their Keepers or others, to have any Prisoner which was in execution, to appear at a day certain the next Term in Court ; and under colour thereof, That the said Prisoner should go at large with his Keeper, in the Vacation or Term time, and return to Prison at the time appointed. And all the Justices and Barons agreed, That it was not allowable or justifiable in Law : But the Warden and Marshal have only a convenient time to bring the Prisoner accordingly in Court, and to carry him back again to Prison : And if they suffer him to go at large any longer time than is convenient, (And the Law shall adjudge what is convenient,) it is an escape in him. And the Lord Keeper and all the Judges agreed, That they would not grant any *Habeas corpus* returnable for a longer day, than the necessity of the case required ; and not otherwise than stands with Law, as in Debt, Trespass, and other Actions, where Bail is to be put in, to answer to suits. And they admonished the Warden of the Fleet, That under colour of such Writs, he should not suffer Prisoners to go at large, upon perill to be charged with escapes.

Sir John Isham *versus* York.

5. **A**Ction upon the Case, for words, Whereas the Plaintiff is and hath been Justice of the Peace of the county of North-hampton for ten years, That the Defendant, to scandalize him in his place, and to cause him to be amoved out of Commission, spake these words, I have been often with Sir John Isham for Justice, but could never get any at his hand, but injustice. After verdict, upon not Guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgement, That these words be not actionable ; For it is not said that he offered him injustice in his office of Justice, Nor that he complained unto him for Justice, as Justice of the Peace, and he denyed it : But generally, That he could not have Justice : And it might be, that he complained unto him for matters betwixt party and party, for private offences, wherein he could not have redress, as from a Justice of Peace. Afterwards at another day Serjeant Crew, of Council with the Plaintiff shewed, That the Plaintiff declaring that he was a Justice of Peace, and that the Defendant intending to scandalize him in his place, and cause him

him to be removed, had spoken, &c. And being found guilty thereof, it must be intended those words were spoken upon that occasion, & of him as a Justice of Peace, and not of him as a private person, or for any private occasion; and compared it to the case of Beechley and Steukley, Coke 4. Rep. fol. 40. And of the same opinion was all the Court, and thereupon Judgement was given for the Plaintiff.

Smith *versus* Crashaw, Ward, and Ford, in the Kings Bench.

The Plaintiff brought an Action upon the Case against the now Defendants, for that they had falsely accused him of Treason, at D. in the County of Northfolke, and had caused him at the said Town to be apprehended by the Constable, and brought before a Justice of Peace, who committed him to Norwich-Castle, and that at the Assizes there, they falsely and maliciously had exhibited a Bill of Indictment of Treason, before the Justices of Assize, and falsely and maliciously affirmed it to be true; By reason whereof he was detained in Norwich-prison, untill discharged by Proclamation. Upon Not Guilty pleaded and Verdict for the Plaintiff, in Michaelmas term Anno 10. Jacobi Regis, it was moved in the Kings-Bench in arrest of Judgement upon exceptions then shewn, and Judgement thereupon, Quod Querens nihil capiat, &c. And it was now there revived again by a new Action upon the Case, in nature of a Conspiracy, as formerly. And the Defendants pleaded special matter of excuse, and Traversed the malicious accusation, which was found against them, and two hundred forty pounds damages given. And it was moved in arrest of Judgement, That this Action lies not, because there never was any precedent seen that any such Action or Writ of Conspiracy for such cause, was brought, nor is it ever mentioned in any of our books, (for the mischief which might ensue to the State, if men should be deterred from discovering Treasons.) But all the Justices, after divers motions in several Terms, & long consideration of this Case (being the first precedent which can be shewn) resolved, That the Action well lies, for it being alledged to be falsely and maliciously, and by Conspiracy exhibited, and the Defendants by the Verdict found to have falsely and maliciously exhibited it, It is not reason it should be punishable; for then no person would be safe, if such practices should be suffered, and the parties endangered thereby should have no remedy, and therefore they adjudged it for the Plaintiff: Note, the Statute and the writ of Conspiracy do not in particular mention for what cause, but generally declare If any falsely and maliciously conspire to procure any to be indicted. And here in this Case, it being set forth, That they falsely and maliciously accused him of Treason, where they knew it to be false, and falsely and maliciously had conspired to cause him to be indicted, and falsely and maliciously exhibited an Indictment, and had sworn the matter thereof to be true,
whereas

whereas it was false, and they knew it to be false, And it is traversed, That they did not falsely and maliciously accuse him, and exhibit the Indictment, which also is found against the Defendants (so the substance of the Declaration is found against them.) It is good cause of Action, and the Defendants are not to be excused of such falsities, nor the Law will not suffer the Defendants to go unpunished; wherefore, by the opinion of all the Justices in the Kings Bench (who delibered their opinions seriatim, viz. Sir Randolph Crew Chief-Justice, Dodderidge, Jones, and Whitlock) It was adjudged for the Plaintiff.

Greens Case.

7. **G**reen prayed a prohibition to the Ecclesiastical Court at Salisbury, because his Wife sued him there to be separated from him, propter sevitiam. And sentence was there given for the Husband against the Wife; and he enforced to pay all the costs for his Wife: Afterward he appealed; and because the Husband would not answer the Appeal against himself, and pay for the transmitting of the Record, he was therefore excommunicated; and now prayed a prohibition. The Court conceived the case to be very hard, that he should be enforced to spend his Money against himself. But because it was alledged, That the course was so in the Spiritual Court, they would advise untill the next Term; and ordered to stay their proceedings in the mean time.

Cook *versus* Younger.

8. **A**ction upon the Case. Whereas the office of the under-Stewardship of the Courts of the Manor of Keysham, and other the Manors of the Bishop of Gloucester, was anciently an office grantable for term of life, with the fee of three pound six shillings and eight pence, by the year; And whereas a former Bishop of Gloucester had granted to the Plaintiff the said Office for Life, with the fee of three pound six shillings eight pence, payable annually at the two feasts of the year, viz. at the Annunciation of the Virgin Mary, and at Saint Michael the Arch-Angel, issuing out of the said Manors. And that the said Bishop dyed, And that the Plaintiff was ready to keep the Courts of the now Bishop; But the Defendant pretending a grant made unto him from the said Bishops successors disturbed him from keeping of them. After Not Guilty pleaded and found for the Plaintiff, It was moved in arrest of Judgement, That this Grant was void, to bind the successor of the Bishop. First, because the prescription is, That the said Office is grantable with a fee of three pound six shillings eight pence by the year, and here the payment is appointed to be at two feasts of the year, and so not warranted by the Statute. Secondly, because the prescription is, That the Office is grantable for

for Life, and he doth not shew for whole life; and it may be for the life of the Bishop, who was Grantor: But none of these exceptions were allowed. And to confirm their opinions, the Case of the Dean and Chapter of Worcester in Cok. 6. Rep. fol. 37. was vouched, That the dayes of payment are not material where no less than the ancient rent is reserved yearly; and that the prescription being to grant for life, shall be intended to be for the life of the Grantor. Thirdly, it was objected, That here was a Districall, the disturbance being alledged to be in the Court at Keysham, and so in other Manors where no villas are, and the Cryall being per vicinietum of the Manors, whereas it ought to be of the bills where in the Manors are; it therefore was not good, nor ayded by the Statute of 21 Jacob. But the Court held, That in regard some of the said Manors are alledged to be within those villas, and the venue being of the Manors, It shall be good by the Statute, although it were of fewer or more places then it ought to be. And therefore Judgement was given for the Plaintiff.

Bryan *versus* Wetherhead, Trin. 20. Jac. Rot. 602.

Ejectione firmæ. Upon Not Guilty pleaded, a special Verdict 9.
was found, That John Bryan being seized in Fee of a Tenement, called Keyshams, in Alesbury, (being Copy-hold of the Manor of Alesbury, whereof Sir John Packington was Lord) erected a building by Ineroachment upon six foot of the waste of the said Manor, and adjoynded it to the Shop of the said house. Afterwards Sir John Packington, in anno 33. Regine Elizabethæ, by Indenture demised to the said John Bryan, the said six foot of waste, so built upon, and adjoyning to the said Keyshams, for an hundred years; who, in anno primo Jacobi Regis, surrendered the said Tenement called Keyshams, to the use of Mary Bryan and her heirs. And, in anno quinto Regis Jacobi, assigned all his term in the said six foot of waste so built upon, to the said Mary Bryan, who, in anno 19. Jacobi, by Indenture let and demised to William Wetherhead the said Tenement called Keyshams, cum pertinentiis, habendum for 70. years; Who assigned all his estate to the Defendant. And afterward, in the said 19. year of King James, the said Mary dyed intestate. And Administration was committed to the said Bryan; who entered upon the said six foot of waste so built upon. And whether by these words, the Messuage called Keyshams, cum appertinentiis, this parcell of the shop, built as aforesaid and annexed to the other shop, should pass or no, was the question; And it was resolved by all the Court, That it passed not: For being but a new *purpresture*, and added to the shop of the tenement in Anno 33. Elizabethæ, and not being found that it had been used altogether with the house, or reputed or accepted as parcel thereof, *ex vi termini*, nothing passed but what was parcel of the house from the time, &c. And the Verdict hath found, That it was not accounted as parcel of the house
from

from any time after the purchase, and therefore it shall not pass by the words cum pertinentiis, especially in a Dred; But in a Devisse Hobart conceived peradventure it might pass. And judgement was given for the Plaintiff.

10. **U**Pon the thirteenth day of November, this Term, Sir Robert Heath Attorney General came into Court, and brought with him a Commission under the great Seal directed to the Lord Keeper, Lord Treasurer, Chancellor of the Exchequer, the Justices of both Benches and Barons of the Exchequer; the Kings Attorney and Solicitor commanding them and all Justices of Peace in their limits, That they should put in execution all the Laws against Recusants, according to the Petition of the Commons in the last Parliament, and the Kings gracious pleasure thereto signified; and further declared his pleasure, That all summs of money collected upon *Escheats*, should be employed to the maintenance of his Ordnance, his Forts and places of defence: and if any should remain, it should be employed for the support of his Navy, and should not be put into his publick Treasury, but by it self, and for those purposes; and that all Leases of Recusants lands, or to their uses, should presently be called in, as far as by the Law they may be; and that none shall make suit to have them for recompence of any service or other uses, but should be only employed to the uses aforesaid.

Sir Francis Vincent *versus* Lesney.

11. **T**Respass. For that the Defendant Accipitrem ipsius Francisci percussit with his staff, upon which stoak the Hawk dyed. The Defendant pleaded Not Guilty, and it was found for the Plaintiff, and damages assessed to six pounds; and now moved in arrest of Judgement, That the Declaration was not good, because he doth not shew what kind of Hawk she was, as Goshawk, Lanner, &c. For Accipiter is the genus, and in the Declaration he ought to shew the Species thereof: And it is here too uncertain, and compared it to Platers Case, Coke 5. Rep. fol. 34. quare clausum fregit & pisces capit, &c. where the Declaration was ill, because he shewed not their number and kind, as Carps, Tenches, &c. sed non allocatur; For here declaring Quod Accipitrem ipsius Francisci, &c. being but one, is sufficient, and not like to Platers Case, which was altogether uncertain: And this Case is the stronger, because it is after verdict, which hath found him guilty of killing of the Plaintiffs Hawk. Secondly, it was alledged, That the Declaration was not good, because it is said Accipitrem ipsius Francisci, and he doth not shew that she was reclaimed, for an Hawk is fera naturæ, and if not reclaimed, the Plaintiff cannot have any property in her, nor can she be said to be ipsius Francisci: And to confirm this Spencers case in 14. Elizab. in the Lord Dyers Reports was cited: But the Court held the Declaration to be good enough, being in an Action of

of Trespas for striking and killing, &c. which he only may have who hath the possession, And it differs from the said Fines and Spencers Case; for there it was an Action of *Trover* and *Conversion*; which lyes not but of an hawk reclaimed, and which may be known by her verbell, Bells, or by some other mark, whereby notice can be taken of her owner. Whereupon it was adjudged for the Plaintiff.

Andrew Farrer *versus* Edward English.

A Sumpsit. The Plaintiff declares, Whereas in consideration he was content, and would accept the sum of twelve Pounds and ten shillings of the Defendant, in discharge of all Reckonings and Account betwixt the Plaintiff, and one Thomas English, the Defendants Brother; (who was then out of the County of Northfolk;) and would Seal and deliver a general Acquittance to the use of the said Thomas, as he should be required. That the Defendant assumed and promised to the Plaintiff, he would procure the said Thomas English, when he returned into Northfolk, to Seal and deliver a general Acquittance to the Plaintiff. And he alledges in fact, that he accepted the said 12. li. 10. s. in satisfaction of all reckonings; And that primo Maii, anno 21. Jacob. at Norwich, he Sealed and delivered a general acquittance to Edward Smith, to the use of the said Thomas English; And that upon the said first day of May, anno 21. Jacobi, the said Thomas English returned into Northfolk; And that the Defendant, licet requisitus by the Plaintiff, the said first day of May, hath not procured the aforesaid Thomas English to make a general acquittance, Sed hoc facere penitus recusavit. The Defendant pleaded Non Assumpsit, and found for the Plaintiff. And now Athoe Serjeant moved in arrest of Judgement. First, because there is not any sufficient consideration why Edward English should pay, or the other should accept the said twelve pound ten shillings in satisfaction, and should make that promise. Sed non allocatur, for he paying, and the other accepting, is sufficient. Secondly, because the consideration is not sufficiently alledged to be performed on the part of the Plaintiff, being executorie. For he alledgeth that he delivered a general Acquittance; but shewes not any, whereby it may appear to the Court to be a sufficient Acquittance. Thirdly, because it was alledged to be delivered to Edward Smith, to the use of the said Thomas English, who is a stranger, and peradventure could not, or would not deliver it to Thomas English; and it was the intent of the parties to have it delivered to the party himself, or to Edward English, who was party to the promise. And for these two last reasons I held, That the Declaration was not good: But the Lord Hobert, Harvie and Yelverton conceived the Declaration to be well enough: For, the promise being general, To Seal and Deliver a general Acquittance

tance to the use of the said Thomas English is sufficient without alledging, That he delivered a general Acquittance, according to the words of the promise ; and the words being, That he shall deliver to the use, &c. And he alledging, That he delivered to Edward Smith, to the use, &c. is also good enough ; especially after Verdict upon Non Assumpsit, wherein he denyed the promise, but not the performance of the consideration. But the Lord Hobert said, If he had demurred upon the Declaration, because he did not shew the said Acquittance, it might peradventure have been otherwise. And it was adjudged for the Plaintiff.

Whyte *versus* Rylden.

13.

Action upon the Case. Whereas the Plaintiff, at London, such a day and year, accommodasset to the Defendant a Gelding, ad equitandum ab London usque Civitatem Exoniæ, & ibidem salvo redeliberandum to the Plaintiff ; That the Defendant, intending to deceive the Plaintiff, rid upon the said Gelding from London unto Exon, and from Exon unto London ; and, by that riding, so much abused the said horse, that he became of little value ; And notwithstanding the Plaintiff, at Exon, such a day and year, required of him the redelivery of his said Gelding, he then refused, and yet refuseth to deliver him ; And the same day, at Exon aforesaid, converted the said Gelding to his own proper use, to his damage of twenty pounds. The Defendant pleaded Not Guilty, and found against him, and damages ten pounds. And it was now moved in arrest of Judgement, by Richardson Serjeant, That this Declaration was not good, to joyn together in one Action, the non-delivery of the horse, according to the contract at Exon, and the conversion to his own use, and the misusing him in the Journey, which are all several causes of Actions. Also it appeareth that here was not a good trial, because the bargain was at London, and the *Tort* was alledged in riding back to London, and the *misuser* in the journey ; and the triall ought to have been at London, where the beginning of the contract was, and not at Exon, where the conversion was alledged. Also intire damages being given for all these *Torts*, (whereas the sole cause of the Action was, for that the Gelding was not redelivered to him,) it is not good. But all the Court delivered their opinions seriatim, That the tryal was good, and the damages well assessed : First, because the principal *Tort* was, the not delivering upon request, at Exon, according to the contract. And then, when he denyed the redelivery, and after converted him to his own use, the Plaintiff may well have an Action for both, and together. And although peradventure the Defendant might have demurred (as the Lord Hobert conceived) for the doubleness of the Declaration ; yet when he demurred not to it, but pleaded Not guilty of the premises, and is found guilty, that makes the Declaration good ; and there is not any cause to stay the Plaintiffs Judgement. Secondly,

condly, The tryal is good de vicineto de Exon, because the Tort is suppoled to be done there, and not at London. And Thirdly, the intire damages are well assessed for the Torts alledged in the Declaration: Whereupon it was adjudged for the Plaintiff. Vide Coke 7. Rep. fol. 1. Bulmers Case.

Castle *versus* Hobbs. Trin. 21. Jacobi, Rot. 2827.

Ejectione firmæ for lands in Donnington, upon Not guilty pleaded, a special Verdict was found, That William Read being Copy-holder for life of certain Lands, parcell of the Manor of Donnington, paying 15. s. per annum, to the Lord of the Manor; and that King Henry the eighth being seized in fee of this Manor, anno tricessimo quinto Regni sui, for the sum of 854. li. granted by his letters patents to Richard Andrews and Peter Temple, to them and their heirs, inter alia omnia Messuagia, Terras, Tenementa; redditus reversiones, servitia, & Hereditamenta sua, in Donnington subscripta, (viz.) totum illum annualem redditum quindecim solidorum & alia servitia exeuntia de terris, Willielmi Read; (& sic diversos alios redditus de Copyholders.) Ac totum illud Messuagium & sex virgatas terræ, in Donnington, in tenura J.D. habendum & tenendum omnia prædicta Messuagia, Terras, Tenementa, redditus reversiones servitia & hereditamenta, in Donnington prædict. to the said Richard Andrews and Peter Temple and their heirs; And whether the said Patent was a good Patent to convey the said Lands in the tenure of William Read, as aforesaid, they prayed the discretion of the Court. And if it were a good Patent; they found for the Defendant; and if not, they found for the Plaintiff. And thereupon, It was argued by Bridgeman for the Plaintiff, and by Crew for the Defendant, And Bridgeman shewed, That it cannot be a good Patent to convey those Lands to Andrews and Temple, because nothing is granted but the Rent of 15. s. and the Services of William Read, whereby is intended only the Rents and Services, which are due from him, as a Freeholder, and there is not any mention of Lands to be granted, or that it is Copyhold, and it shall not be said to be a passing of the Freehold of the Copyholder. And therefore the King being deceived in his Grant, nothing passed from him, and so the Grant void. But Serjeant Thomas Crew shewed, That this Patent was to pass the Rent of the Copyholder, and the Freehold of the Copyholder in fee, otherwise the Patent should be construed void, wherein these words of the Kings Grant are particularized, (viz.) Totum illud Messuagium, & sex virgatas terræ, Habendum Messuagium, Terras, &c. Which implies there is no mispession in the Patent: For thereby a Messuage is granted, which cannot be, unless the Copyhold should pass; Wherefore he conceived, It shall pass by construction. And he moved, That if the Patent were void, yet the Plaintiff could not have judgement. For it is found, That King Henry the eighth was

seized in fee, and made that Patent; which if void, then the lands are again in the Crown; and no title being found for the Plaintiff, he cannot have any judgement: But all the Court conceived, It was a void Patent, to convey the land of the Copyholder to Andrews and Temple. For first there is not any land granted, but the rents and services of William Read, which is intended feehold: And there being none such, the grant is merely void. And for the second point, They all conceived, For as much as the Jury hath found, That if it were a good Patent, Then for the Defendant; if otherwise, they found for the Plaintiff. It is intended, That there is a sufficient title found for the Plaintiff, unless by this Patent it be defeated and avoided. So that if the Jury be satisfied, that the Plaintiff hath any good right by any other manner of title, The Court ought not to doubt thereof. As it is resolved in Goodales Case in the Lord Coke 5. Rep. fol. 97. And it was adjudged for the Plaintiff.

Smith *versus* Trinder, & alios.

15.

E Jectioe Firmæ, of a lease by Elizab. Countess of Berkshire, of lands in Water Eaton, upon evidence to the Jury at the Barr, upon Not Guilty pleaded, the case was, That Francis Earl of Berkshire purchased the land in question, to him and his wife, and their heirs, in anno 41. Elizab. Regina. Afterward, in anno decimo sexto Jacobi Regis, Francis Earl of Berkshire (without his wife) lets this land to Sir Lawrence Tanfield, late chief Baron of the Exchequer, for threescore years, if they lived so long, rendering two hundred and eighty pounds yearly rent, at the two usual feasts, during the term: Francis dies. Whether this lease shall bind the Countess by the Statute of 32. Hen. 8. cap. 28. was the question, because she was not made a party to the Indenture. And Yelverton, Harvey and myself, upon the first motion and perusal of the Statute conceived, It should bind the Countess. For the body of the Act is, That all Leases made of Land, which the Husband is seised of, in right of his Wife, of inheritance, or jointly with his Wife by purchase, during the Coverture, or before, shall be good and effectual: And that the Wife shall have such remedy for the rent, as he that made the lease. But then the proviso is, That such lease shall be made of such Land, whereof the Inheritance is in the Wife by Indenture, in his and his Wives name. And that she shall seal: And that the Reservation shall be to him and his Wife, and to the Heirs of the Wife. And that clause shall extend to Lands of Intail of the Wives, jointly by purchase during the Coverture: For clearly by the body of the Act, It is a good Lease, and not within the Proviso: Because it is not the sole Inheritance of the Wives; And the Proviso extends only thereto; And it is out of the words and intent of the Proviso: For the appointment thereby is, That the reservation shall be to them, & the Heirs of the Wife, which is not intended of a joint estate; But the reservation should be to both their Heirs. So out of the intent and words of the Proviso.

But

But the Lord Hobert doubted thereof, wherefore it was directed to have it found specially; Then upon the evidence it appeared, that anciently it was in Lease, and occupied by two Tenants; the one paid sixty pounds, and the other an hundred and eighty pounds, and so for both two hundred and forty pounds yearly rent only; and now they are joyned in one Lease, and two hundred and eighty pounds yearly reserved, which is more by forty pounds a year than both the Leases were before. And whether this be a good Lease within the Statute, &c. whereupon a special verdict was found at the barr for both points, and afterwards, it was ended by arbitrament.

Hodgkinsonne *versus* Whood, Trin. 19. Jacob Rot. 596.

Ejectione firmæ of a Lease of William Rogers for lands in W. in the County of Salop, upon Not Guilty pleaded, a special verdict was found, That Thomas Rogers was seised of that land in fee, holden in Socage, and had issue by several *wenters*, Francis his eldest Son, and William his second Son, and devised the land in Question to Francis his Son, for life, and after, to the use of the Heirs Males of his body, and for default of such issue, to the Heirs Males of Thomas Rogers, and the Heirs Males of their bodies for ever: And for default of such issue to the use of his own right Heirs. And afterwards maketh a Lease for thirty years to William his Son, to begin after his death, and dyeth without other alteration of his Will. William enters, and surrenders his Lease of thirty years to Francis, who enters and lets that Land to the Defendant for years yet enduring; and afterword Francis dyeth without issue, William enters as Heir-male of the body, and makes this Lease to the Plaintiff: And hereupon two questions were made. First, whether this Lease made to William for thirty years, to begin after the death of the Devisor, (so being to begin at the same time, that the devise of the Inheritance should take effect) be a countermand and revocation of that devise totally, or only Quo ad the term, and shall stand as to the Inheritance. And as to that point all the Justices resolved, It is not any revocation of the Inheritance, but only for the term, for they both may stand together; and there shall not be any revocation unless it be expressed, That the intent of the Testator is changed, or that they cannot stand together. And here it may well stand with the Inheritance; and for that point, was cited the Case betwixt Coke and Bullock in anno secundo Jacobi, in the Common Bench, where one devised land to his Sister in fee, and afterwards made a Lease for sixty years unto her of the same lands, to begin after his decease, and delivers it to a Stranger, to the use of his Sister, which Stranger did not deliver it unto her in the life of the Testator, but afterwards, and she refused, and claimed the Inheritance; It was resolved because the Devise and the Lease made
to

16.

to one and the same person, beginning at the same time, cannot stand together in one and the same person, That it was a countermand of the Devise: But there they all agreed (besides Warberton Justice) That if the Lease had been made to any other than the Devisee, they might stand together, and the Lease should not have been a revocation of the Will, as to the Inheritance, but only during the Term. Another Case was cited in Mich. ann. 41. & 42. Elizab. Regn. in this Court betwixt Coward and Marshall, where one devised lands by his will in writing to one of his younger Sons in fee, and after by another clause in the same Will, devised the same lands to his Wife for life, rendering annually to his said younger Son twenty shillings. It was resolved that both these devises may stand, and that one is not a revocation of the other. But Yelverton cited a Case, adjudged in the Kings Bench, where one deviseth to one in fee, and afterwards makes a feoffment to the use of his Wife for life, remainder to his right Heirs; so as it is Quasi the ancient reversion. Yet because he departed with all the estate, it shall be a revocation of the Devise in all, and shall not be good without a new publication; wherefore they all resolved, That in this Case there is not any revocation of the Inheritance; and appointed there should be no more arguments at the Barr as to that point. The second Question was, whether this Devise to Francis and to the Heirs-males of his body, and for default of such issue to the Heirs Males of the Devisee, and the Heirs Males of their bodies, and for default of such issue to the right Heirs of the Devisee, be a limitation in tail, to the Heirs Males of the body of the Devisee, so that William may claim by this limitation an estate in tail as by purchase; or whether it vested in Francis only, as being Heir Male to the Devisee, and not by purchase; or if the Inheritance in fee-simple vested in him, for then his Lease for years is executed out of the fee estate, and William not claiming as right Heir, is then bound by that Lease made by Francis. And of this point was more doubt conceived, wherefore they ordered it should be argued the next Term; and afterwards, in Hilary Term it was moved again, and adjudged for the Plaintiff.

William Platt Assignee of Richard Platt *versus* Plommer,
Mich. 20. Jac. Rot. 1759.

17. **C**ovenant upon Demurrer, the Case was, That a Coppyholder in fee, with the Lords Licence, made a Lease for twenty one years by Indenture, rendering rent, wherein the Lessee covenants for himself his Executors, and Assignes, with sufficient Sureties, That he will erect a pale about such a Close, and lay upon the lands demised yearly forty loads of dung, and sufficiently repair the houses. Afterwards the Lessor surrendered to the use of the Plaintiff and his Heirs, who was admitted accordingly; and for not performing

ming these Covenants, the Plaintiff, as Assignee, brings his action of Covenant; and whether the Assignee may maintain this Action by the Common Law, or by the Statute of 32 Hen. 8. Cap. 34. was the Question; And upon this Declaration the Defendant demurred: The principall doubt was whether a Copibolder, who comes to his Tenement by surrender of the Lessor, be such an Assignee as may have an Action of debt or Covenant by the Statute of 32 Hen. 8. Secondly, admitting he be not within the Statute, whether by the Common Law (Covenants being made by express words with the Lessor his Heires and Assignes) the Assignee for these Covenants may maintain this Action. This Case was moved by Hennage Finch for the Plaintiff, and by Grawly for the Defendant, Et adjournatur.

Knight *versus* Harvy, Administrator of Harvy.
Hill. 22. Jacobi Rot. 635.

DEbt brought in Hillary Term, anno 22 Jacobi, upon an obligation of eleven pound, dated vicessimo Maii, anno vicessimo Regis nunc. The Defendant imparles. And in Easter Term, primo Caroli Regis, the Declaration and Plea of the Defendant was entered, and he declared therein upon an obligation dated 20. Maii, anno 20 Regis nunc. Afterwards, by order of the Court the said Declaration was amended, and made Regis Jacobi: And the Defendant pleaded thereunto a Judgement upon another bond of 100. l. dated anno quarto Regis nunc; (which was mistaken, for it ought to have been Regis Jacobi) and that he had *Riens en ses mains*, but only to satisfy that Judgement; and thereupon the Plaintiff joyns issue, That the said recovery was made by fraud and Covine, and found for the Plaintiff; and this Term the Defendant moved in arrest of Judgement, That this plea is repugnant and impossible, That a recovery should be anno quinto Regis nunc; And therefore the issue, joyned thereupon is nought, and no Judgement can be given in this case: But all the Court conceived, That for as much as there was a default in the Defendants Plea, although the Plaintiff had joyned issue thereupon, which is found to be false, and the Defendant hath not confessed Assers in his hands, but only for that Judgement: Yet the Plaintiff having a good Declaration shall have Judgement; whereupon it was adjudged for the Plaintiff.

18.

Sir Edward Coke Sheriff of Buckinghamshire his Case.

SIR Edward Coke late Chief-Justice of the *Common-Bench*, and afterwards of the *Kings Bench*, and removed from his places, being made Sheriff of the County of Buckingham had a *Dedimus potestatem* to take his oath annexed to a Schedule: To which he took exceptions, for that there were more Additions to the said oath than

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were

were in the ancient oath, which is in the Register, and afterwards confirmed and appointed by the Statute of 18. Ed. 3. He therefore conceived there ought not to be such Additions unless by Parliament. The Additions were, First, *That he should seek to suppress all Errours and Heresies commonly called Lollories, and should be assistant to the Commissaries and Ordinary in Church matters* : Which part of the oath was added by reason of the Statutes of 5. Rich. 2. and 2. Hen. 4. cap. 15. whereby it is appointed that the same should be taken by the Sheriff, especially for those two causes. But he thereto certified, That those Statutes are repealed by the Statutes of *primo Edwardi sexti* and *primo Eliæ*. and therefore ought not to be taken. The second Addition was, *That he should return reasonable issues*, whereto he excepted, because it is appointed by the Statute, and penalties imposed for not performing it; and it ought not to be upon oath. The third Addition was, *That he should return all Juries of the nearest and sufficient persons*, whereto he excepted, because that part of the Oath is not appointed by any Statute; and it is against common practice, that he himself should return Juries, it being commonly done by the Under-Sheriff, who is also appointed by the Statute to be sworn. The fourth Addition was, *That he should cause the Statute of Winton, and the Statutes against Rogues and Vagabonds to be put in execution*, whereto he excepted, because the Statute of Winton is altered, and the Statutes against Rogues and Vagabonds are appointed to be executed by the Justices of the Peace, and not by the Sheriff. Upon these Exceptions the Lord Keeper assembled all the Justices, to confer with them about the same. And as touching the first point they conceived it was fit to be omitted out of the Oath, because it is appointed by Statutes which are repealed, and were intended against the Religion now professed and established, which before was condemned for Heresie, and is now held for the true Religion. For the second Addition they conceived it convenient, and for the service of the King and Subjects, and the greater part of them were of opinion, That an Oath in this, and the other points, may be well enjoined by the King and order of State without Parliament; and it may be well imposed upon the Sheriff to take, being for publique benefit and execution of the Lawes. For the third Addition, it is not so strictly to be intended, That he himself should return Juries, but it ought to be intended according to the construction of Law, That he himself by himself, or Under-Sheriff, should return the Juries, which is a sufficient performance; for the Law saith *Qui per alium facit, per seipsum facit*. For the fourth Addition, it rests upon the former reasons, That this Oath being appointed and continued divers years by direction of the State, although without the expresse authority of any Statute Law, yet may be well continued for the publick benefit, in repressing such persons : And although authority be given to the Justices of the peace to put those Statutes in execution, yet it doth not take away the Sheriffs right, who is the publick Conservator : And so they delivered their opinions to the Lord Keeper at his house at Reading.

Memorandum,

M^{emorandum}, That the last day of this Term, there came a Writ from the King to the Justices of the Common-Bench, commanding the Court to be adjourned *from Reading to Westminster* in the County of *Midd.* and that all Pleas and Proceeding should be adjourned to *Westminster*, to be held there the day of *Octabis Hillarii*; (And like Writs were directed to the Justices of the Kings Bench and Barons of the Exchequer) and it was openly read there, and then the adjournment made accordingly of all Pleas, &c. unto *Westminster, &c.* 20.

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Termino



Termino Hillarii, anno primo *Caroli* Regis,
in Communi Banco.

1. **M**emorandum, That in this Vacation *Sir Henry Hobert Knight and Baronet*, Chief-Justice of the Common-Bench, dyed at his house in *Blyckling* in the County of *Norff.* being a most learned, prudent, grave and religious Judge.

Sir Richard Udall *versus* William Tindall, Vicar of Alton,
Hillarii 22. Jacobi Rot. 733.

2. **T**Respals, For taking two loads of Moad, upon Not Guilty pleaded, a special Verdict was found, That if Moad be Minutæ Decimæ, then the Jury found that the Defendant is not guilty; If it be not Minutæ Decimæ, then they find for the Plaintiff: and it was argued by Henden Serjeant for the Plaintiff, and by Bridgeman for the Defendant; and on the behalf of the Plaintiff it was said, That in as much as it is so found, without moze circumstances, it shall not be intended to be Minutæ Decimæ, for it may be that a great quantity of Moad may be sown, and the greatest part of the commodity of the Parish may consist in Moad, and then it cannot be reputed Minutæ Decimæ; for although in their own nature they be Minutæ, yet they now become Majores, if the greatest part of the profits of the Parish consists therein. For Minutæ Decimæ are properly intended such, which are but of small consideration in a Parish, as hearbs in a Garden, and such like; Therefore he said that Moad sown in the field is not Minutæ Decimæ: And that in tercio Jacobi upon a special Verdict in Essex betwixt Hertman and Boxley, it was resolved, That Tyche of Welde (which is a kind of grasse growing amongst other grain, and commonly sown therewith) were not Minutæ Decimæ. But Bridgeman for the Defendant vouched the Dean and Chapter of Norwich's Case, Paschæ 43 Elizab. where it was adjudged upon a special Verdict, That the Cythes of forty acres of land planted with Saffron, appertained to the Vicar and not to the Parson. But Henden answered, That was not because they were Minutæ Decimæ; but for that upon the Endowment found, the Allegation was that the Parson should have Cythe of Corn and Hay only: But Yelverton said That was not the reason, but because they were accounted as Minutæ Decimæ, and appertained to the Vicar: And all the Justices resolved, That Moad growing in nature of an herb, the Cythe thereof ought to be reputed for Minutæ Decimæ, and Judgement was given for the Defendant.

Mary Peacock, Executrix of Richard Peacock, *versus* Steere.

RAvishment de Gard, The Plaintiff declares, That one John Steere, held such land of the Testator by Knights service, and dyed, his heir within age; and that the Testator seized the said Ward and died thereof possessed, and afterwards the Defendant ravished him, The Issue being upon the Tenure, was found for the Defendant, and the question was, upon the Statute of quarto Jacobi Regis capite tertio, Whether the Plaintiff shall pay any costs? because she counts, That she brings her Action upon her own possession. And Hutton, Harvy and my self held, That the Defendant shall not have costs; But Yelverton, *è contra*, vide Mich. duodecimo Jacobi, betwixt Goldsmith and the Lady Platt, & Mich. tertio Jacobi, betwixt Havers and Dacre, And Mich. 38, & 39. Eliz. betwixt Fetherston and Allybard.

Termينو Paschæ, anno secundo *Caroli* Regis,
in Communi Banco.

Crumpe versus Barne.



1. **A**ction for words, Whereas the Plaintiff was a Citizen of Gloucester, and so had been for twelve years, and used all that time the trade of a Shoemaker, That the Defendant to defame him spake these words of him; He is a Bankrupt Rogue. After verdict upon Not Guilty pleaded and found for the Plaintiff, It was moved in arrest of Judgement, That these words were not actionable; For Bankrupt is not spoken indefinitely, nor absolutely by it self, but as an adjective to Rogue; so the words are extenuated. Also a Shoemaker is not such a person as may have an action for these words, no more than a labourer or husbandman: for he doth not live upon buying and selling, or upon credit, but upon his manual labour. But it was resolved, That the Action lyes: For the addition of Rogue to Bankrupt doth not extenuate but aggravate it, and shews his malice; And a Shoemaker is such a person as is within the Statute of Bankrupts; for he lives by his credit in buying Leather, and selling it again in Shoes, &c. and not upon his manual labour only, as labourers and husband-men do. Whereupon it was adjudged for the Plaintiff.

Foster versus Smith.

2. **A**ssumpsit, Whereas The Defendant was indebted to the Plaintiff in seven pounds, That in consideration thereof, he promised to pay, &c. The Defendant pleaded, Non assumpsit, and found against him; And it was moved in arrest of Judgement, That the Declaration is not good; For he doth not shew any cause of the debt, viz. by Bond or otherwise; And although he hath pleaded Non assumpsit, and it is found against him, yet the Declaration being ill, the Verdict doth not ayde it; It was therefore adjudged for the Defendant.

Anne Smith

Anne Smith *versus* Anne Lady Wade, Executrix
of Sir William Wade.

3. **A** Sumpsit upon a promise of the Testators; After Non Assump-
sit pleaded, and Verdict found for the Plaintiff, it was mo-
ved in arrest of Judgement, That the Writ and Declaration were
against Anne Executrix of Sir William Wade, and the Issue, Record,
and Venire facias were accordingly, for a Tryal betwixt the said
parties; but being tryed by a Nisi prius writ in London, the Writ
of Habeas Corpora was to have Corpora Juratorum, &c. betwixt
the said Anne Smith and the Lady Wade, Executrix of Sir Henry
Wade Knight; So a misprison of Henry Wade for William Wade,
and therefore it was moved in arrest of Judgement, that it was a
Tryal without warrant; for the Record of Nisi prius, and the Is-
sue being against the Executrix of William Wade, the Habeas Cor-
pora was not sufficient, being by Nisi prius to try that Issue. But
all the Court conceived, that in as much as the Issue is good, the
Record of Nisi prius good, the Venire facias good according to the
Issue, although there be a misprison in the Habeas Corpora, it was
but the fault of the Clerk, and may be well amended. Because
there is not any alteration of the Verdict, and it is well warranted
by the former Record; therefore it was appointed to be amend-
ed, and adjudged for the Plaintiff.

Swayne *versus* Rogers, in the Exchequer Chamber.

4. **T** Respass for Battery in the Kings Bench, and Judgement for
the Plaintiff, Error in the Exchequer Chamber was assign-
ed, for that the Judgement was Capiatur, whereas the Battery was
before the general Pardon, so as the Fine is pardoned, and the
Judgement ought not to have been a Capiatur, for the Court is to
take notice of the Pardon and give Judgement for the party, but
not any Fine, Sed non allocatur. For the Court needed not to take
consulance thereof without demand of the party, and it doth not ap-
pear whether the party be any of the persons excepted, or one who
is to have benefit of the Pardon: But afterwards it was shewn
that the Declaration was of Assault, Battery, and Imprisonment,
and the Defendant as to the Battery pleads a Justification, where-
upon the Plaintiff demurred; and as to the Imprisonment he pleads
another Justification, whereupon the Plaintiff takes Issue, De In-
juria sua propria, &c. and Issue joyned; and at the Tryal the Jury
found as to the plea for the Battery, That the Defendant did it de
Injuria sua propria, and assessed Damages five pound, and Costs
forty shillings, whereas they ought not to have medled therewith,
because a Demurr was thereupon; But only have found condition-
al Damages if it should be adjudged for the Plaintiff: And for
the Imprisonment they did not find the Issue, but assessed condition-
nal

all Damages twenty shillings; so they found m^{er}ly cross to what they ought, and the Judgement upon this Verdict for the five pound Costs and the forty shillings found by the Jury, nullo habito respectu of the twenty shillings was m^{er}ly erroneous; wherefore, although it was prayed that it might be amended, it appearing to be the misprison of the Clerk who entred the Judgement, yet Non allocatur; But the Judgement was reversed.

Smith *versus* Richardson, in the Exchequer Chamber.

ERror upon an Assumpsit in the Kings Bench, wherein the Plaintiff declared, Whereas in consideration the Plaintiff had sold to the Defendant four bags of Hopps, whereof th^{re} bags weighed septem centenas & unum quarterium centenæ Anglice, seven hundred and one quarter of an hundred weight, and the other bag weighed ducentas centenas & dimidium unius centenæ Anglice two hundred and an half weight; That the Defendant assumed to pay according to the rate of seven pounds for every hundred of the said th^{re} baggs, and according to the rate of six pound ten shillings for every hundred of the other bag, Et dicit in factis that the foresaid th^{re} bags according to the said rate amounted to the sum of fifty pound and fifteen shillings; and the foresaid other bag according to the rate aforesaid, attained to sixteen pound five shillings, yet the Defendant aforesaid, &c. The Defendant pleaded Non assumpsit, and found against him, and damages given only according to the said rate before mentioned, and Judgement entred; and thereupon a Writ of Error was brought in the Exchequer Chamber, and the Error assigned was, For that ducentas centenas & dimidium unius centenæ Anglice, two hundred and an half weight, &c. This Anglice is void and repugnant to that which the Anglice was before, and contrary to the propriety of the words. For ducentas centenas is two hundred hundred, so it is much more than the price reacheth unto, and it is without sense, and therefore repugnant, and the Declaration ill, and Judgement erroneous: But all the Justices and Barons held that it was no Error, being in disadvantage to the Plaintiff and not material; for it rests only in damages, and the Jury hath given according to that rate, so as there is not any prejudice to the Defendant; and the issue being upon Non assumpsit and found as is alledged, it is good enough, and Judgement was affirmed,

5.

A Case out of the Court of Wards.

UPon the eleventh of May, this Term all the Justices and Barons being assembled, the Chief Baron propounded a Case depending in the Court of Wards, viz. two Joynt-Tenants to them and their Heirs; the one of them makes a conveyance to the use of himself and his Wife for a Joynture, and the advancement of his Son.

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Whether

Whether this be an assurance within the Statutes of 32. and 34. *Hen. 8.* so as the King shall have the third part. Sir *Randolph Crew*, the Chief-Justice, and the Chief-Baron, were divided in their opinions from the other Justices and Barons in this point, who all, upon that suddain motion, conceived it to be out of the Statutes : For the words are *If any sole seised, or seised joyntly with others, &c.* there in such cases the Statute provideth, That the King shall have the third part upon such conveyance ; But where two are joyntly seised to them and their Heirs, and the one makes a conveyance : this is out of the words of the Statute of 32. *Hen. 8.* and therefore ought not to be within the intent of 34. *Hen. 8.* for that is a Statute of Explanation, and shall be construed only according to the words, and not with any equity or intendment : For there cannot be an Explanation upon an Explanation, as it is held in *Butler and Bakers Case in the Lord Cokes 3. Rep. fol.* and *Jones* said it was so resolved in the Court of Wards by the opinion of the Chief-Justice in anno 43. *Eliab.*

7. **M**emorandum, At the same time another Question was moved amongst them, where Judgement is given in *debt* at the grand Sessions in Wales, against a Defendant, inhabiting in one of those Counties, and the Defendant dyeth intestate, and one who inhabits in London takes letters of Administration. Whether any execution may be in Wales, because he neither inhabits nor hath any thing there ; and if not, then whether that Record may be removed into the Chancery by *Cerciorare*, and sent by *Mittimus* into the Kings-Bench or Common-Pleas, to the intent to take forth a *Scire facias* upon it, to have lands out of Wales (or goods in the hands of the Administrator lyable to it there) And all the Justices and Barons conceived *Quæ nemy* ; for he may not have a *Scire facias* in any Court, but where the Judgement is given ; and if such course should be used, all Judgements in the Courts in London or in inferiour Corporations, would be removed and executed here, which would be a great inconvenience to the Subjects ; to make lands or persons lyable to such Judgements in other manner than they were at the time of the Judgements : Wherefore there is no remedy, but to execute such Judgements in their peculiar Jurisdictions.

Crane versus Crampton.

8. **A**ction upon the Case *sur Assumpsit*, That the Defendant in consideration of a Ruff-band delivered unto him by the Plaintiff, promised to pay unto him, at the day of the said Plaintiffs Marriage, the sum of three pounds, and alledgeth in fact that he was married such a day, Et licet sæpius requisitus, yet he hath not paid : Judgement given *sur nihil dicit*, and after writ of inquiry of damages executed in *Wozff.* it was moved in arrest of Judgement, That the Declaration was not good, because he doth not shew that he gave notice of his Marriage before he married,

for otherwise the Defendant is not bound to take notice thereof; for it rests in the privity and knowledge of the Plaintiff, and not of the Defendant. And it cannot be a breach of promise unless the Defendant hath notice given him before the Marriage; also the payment ought to be after request, and the day of request ought to be mentioned, for licet sapius requisitus will not serbe; and it appears not that the request was after Marriage; for request before will not serbe, but Hutton, Harvey, and Yelverton conceived it was good enough. For the Defendant at his perill ought to take notice, and the Plaintiff needs not shew that he gave notice of the Marriage; and postea requisitus sufficeth, without shewing the day of the request. But I doubted thereof, For a President was cited of one Morse in the Kings Bench, where for not alledging notice, the Judgement was reversed; but notwithstanding this exception Judgement was given for the Plaintiff.

Lacon versus Barnard, Attorney. Hillar. 10. Jac. Rot. 8, 0.

UPON a Bill of *Trover and Conversion* of one hundred Sheep, shewing that the Plaintiff upon the twenty fifth day of March anno 19. Jacobi Regis was possessed of those goods and lost them, and that upon the last day of Aprill they came to the Defendants hands, who the same day sold and converted them to his proper use; the Defendant for eleven of them pleaded Not Guilty, Et quoad the 89. residuum he pleaded, That the Plaintiff at another time, viz. upon the eighteenth day of September anno 19. Jacobi Regis, prosecuted an original Writ out of the Chancery, returnable in this Court, against the Defendant, and one Brian Smith, quare ceperunt & abduxerunt 100. oves, and thereto they appeared, and the Plaintiff counted against them of their taking of an hundred sheep upon the fourteenth day of Aprill, anno 19. Jacobi Regis; and thereto they pleaded Not Guilty for the eleven sheep, and for the eighty nine residue they pleaded a recovery in debt, by the Defendant against Edward Hatcliff of a debt of sixty pound, and that the said Edward Hatcliff was then possessed of the said eighty nine sheep, and that by virtue of a Fieri facias those goods were sold unto him, whereupon he took them into his custody. The Plaintiff thereto replied, and took issue, and found for him, and damages assessed to two pence: And thereupon the Plaintiff had Judgement of the said two pence damages, and had six pounds for Costs, and averses that the said taking and driving, for which the recovery in trespass was had, and the conversion of the said eighty nine sheep in this Action be all one, and that the said Judgement is yet in force. To this plea the Plaintiff replies, that true it is, he brought such an Action, and recovered the two pence for the taking and driving of the said eighty nine sheep, and six pounds for Costs; but he further saith, that the said two pence damages was not assessed for the value of the said sheep and the conversion of them, and that the said Defendant

at the day and year in the Bill, sold the said eighty nine sheep and converted them to his own use. The which conversion is the same conversion, whereof he now complaineth, and travaileth, That the said taking and driving, in the said Action, whereupon the Judgement was given, is the same Trespass, quoad the conversion of those goods whereof the Plaintiff now declareth. And upon this Replication the Defendant demurred generally, and it was now argued at the Barr by Serjeant Crew for the Defendant, and by Serjeant Henden for the Plaintiff; and after the said arguments at the Barr, it was resolved by Horton, Harvy, and myself, That this Replication is good, and that the Plaintiff ought to recover. For the damages of two pence given for the eighty nine sheep being so small, is in it self an implication (and the Court shall so intend it) that it was given only for the taking and driving of them, and that the Plaintiff had them again, and not in lieu of the value of them; for if it should be given for the value of them, then the Plaintiff should thereby lose the property in them, and have nothing for his sheep but two pence, and the Defendant should have the sheep: But the Law will rather intend (and so it may be averred) That those damages were given only for the taking and driving, and that the Plaintiff had them again, and afterwards lost them, and that the Defendant found, and after converted them, &c. and this demurrer is a confession that he converted them after the said taking and driving; for the action of trespass is supposed to be upon the fourteenth day of Aprill in the nineteenth year of King James, and the *Trover* and *Conversion* in this Action is supposed to be upon the thirtieth day of Aprill the said nineteenth year of King James, which well stands with the former Action: for the Defendant may take and chase them one day, and the Plaintiff recover damages for the chasing, and after lose them, &c. And this first Action is brought for the first taking and chasing, and the second for the conversion, so both may stand together, which is now confessed by the Demurrer, and that the damages were given for the first taking and driving, and not for the conversion; therefore they conceived the Plaintiff should recover; but Yelverton held, because the Action of Trespass is *Cepit & abduxit*, therefore it includes that the Defendant had them, and ousted the Plaintiff of the possession. And although the damages be small, it shall be intended to be given for the sheep; and if so, then he cannot have an Action for converting them afterward, vid. 11. Rich. 2. Title Trespass 107. 40. Ed. 3. fol. 27. 46. Ed. 3. fol. 18. 14. Hen. 7. fol. 12. 44. Ed. 3. fol. 2. But Judgement was given for the Plaintiff.

Termine Trinitatis, anno secundo *Caroli* Regis,
in Communi Banco.

Crips versus Gryfil. Trin. primo Car. Rot. 1931.

Ejectione firmæ of lands in Leighton-Buffard of the demise of Robert Key, upon a special verdict the case was, That John Gryfill, Father of the Defendant, was seized in Fee of the said Lands, and upon the tenth day of October, anno 16. Jacobi Regis, by Indenture of Feoffment, mortgaged them to Peter Key and his Heirs, upon condition, if he or his Heirs paid to Peter Key and his Heirs one hundred and sixty pounds, upon the twentieth day of October anno domini 1624. that he might re-enter. That afterwards upon the thirtieth day of March anno 1619. the said Peter Key, by his Will in writing, gave to Robert Key all his Goods, Money, Bills or Bonds, Mortgages or Specialties for Money, and made him his Executor, and dyed; and that the one hundred and sixty pound not being paid, Robert Key entred and let to the Plaintiff: And without argument the opinion of the Court was, That these words All my Mortgages, made a good devise of the lands mortgaged; whereupon Judgement was given for the Plaintiff.

Reymund versus Hundred de Oking.

Action upon the Statute of Winton, Whereas one Palmer the Plaintiff's Servant was robbed within the said Hundred, of sixty eight pounds of the Plaintiff's moneys by persons unknown, and had made Hue and Cry according to the Statute, and none of the Thieves were taken; and the said Palmer had made oath before such a Justice of peace, of the said County next adjoining to the said Hundred, within twenty dayes before this Action brought, That he did not know any of the parties who robbed him, That the said Hundred had not made him any recompence. Upon Not Guilty pleaded, and tryed at the Barr this Term, and found for the Plaintiff, it was moved in arrest of Judgment, that this Action lies not, because the Plaintiff himself was not sworn, That he knew not any of the parties who did the Robbery; for it is not sufficient that the Servant who was robbed was sworn, for by the Statute of 27. of Eliz. the party who brings the Action ought to make the oath; and it was argued that the Servant who was robbed ought to have brought the Action, and then his oath would have been sufficient;

but when the Master brings the Action, he himself ought to be sworn that he knew not any of the Robbers, otherwise he might not bring it, and therefore the Action lyes not. But it was resolved by the Court, That the Action well lyes for the Master, and that the Servants oath was sufficient; for it is properly in his notice that he was robbed, and did not know any of the Robbers, and the Master knows not that he was robbed, or who were the persons, but by report of his Servant; and it would be inconvenient if the Master should not bring the Action, but the Servant only, for the Servant might release or compound, or discontinue the Suite, and so the Master should have the loss by his falsehood; therefore the Master shall bring the Action, and have his Servant, who was robbed, be his Witness; whereupon it was adjudged for the Plaintiff. See Coke book of Entries, where such Action is brought by the Master, and the Servant sworn.

Sir Robert Banisters Case.

3. **D**Ebt for not setting out Tythes, upon a special Verdict the case was. A Parson made a Lease of his Rectory Anno no-
no Elizab. for sixty years, which was confirmed by the succeeding Bishop, and succeeding Patron, neither of them being Bishop or Patron at the time of the Lease. Resolved per totam Curiam, That it was good according to the opinion in Newcombs Case in the Lord Cokes 5. Rep. fol. 15. And so without argument it was adjudged for the Plaintiff.

Aylesworth *versus* Chadwell, in the Exchequer Chamber.

4. **E**rror of a Judgement in Debt, upon an Obligation in the Kings Bench, the first Error assigned was, That the parties being at Issue, The awarding of the Roll was of a Venire facias retornable die Martis post crastin. Purificationis. And the Venire facias was made retornable, die Sabbati post octabis Purificationis. The second Error was, That the Venire facias did bear date the twelfth day of February, and was retornable die Sabbati post octabis Purificationis, which is before the Terme. Sed non allocantur, it being a judicial Process, and the fault of the Clerk, shall be amended. And thereupon Judgement was affirmed.

Browne *versus* Taylor, Hillary 22. Jac. Rot. 1669.

5. **E**jectione Firmæ, of a Lease of Sir John Savill and others, of lands in Stapleton, Upon Not Guilty pleaded, It was found for two parts for the Defendant, And a special Verdict for a third part. That one Holgate was seized of these Tenements, holden by Knights service, And in Anno 21. Jacobi, infeoffed Spencer and others to the use of himself for life; and after his decease, to the use
of

of such person or persons as he should appoint by his Will, for such interests, or otherwise, as in his said Will should be specified. Afterwards he makes his Will in writing, and thereby deviseth that all his Tenants of his Farms, shall enjoy their tenements for twenty one years after his decease, And that R. T. shall have the rent out of his land for his life, payable at two feasts of the year. And deviseth to his wife all his Lands in Stapleton for her life; Whether this be a good declaration of the uses, to limit it to his wife: and that she shall take it by the feoffment, or whether by the immediate devise: (And then the devise is void for a third part, because the lands are holden in Capite) was the Question. And after argument at the barre (without any at the bench) Hutton, Harvie and Yelverton agreed, That they should take by the devise, and not by declaration of the uses. For they held, That after the feoffment in this manner, he hath a qualified se in him, as owner, so as he may make his will of those lands, and devise the rent as owner thereof. And then the land being held by Knights service, The devise is void for a third part. Or he may declare his Will, as upon the feoffment, which shall inure as a Declaration of the uses upon the feoffment, and then all the land passeth. So that here, when he makes this Will, without reference to the feoffment, the Law will construe it as the Will of one who is owner, and may dispose of it as owner, and not as Declaration of the uses, which is an Authority only: Also the Will appoints rents to be paid, which is a good Will and Devise, but the Authority limits him, That he may not appoint any rents to be paid. And to have it to be a Will for one part, and to dispose as by authority for another part, cannot be good in Law, therefore it shall be adjudged as a Will to inure for both; But I doubted thereof, and conceived it might be well construed as a Declaration, And thereby it shall be a good limitation for all the lands, And that by the said Authority, he might dispose of the rent out of the land; And his declaring that his Tenants shall hold their Farms for twenty one years after his decease, cannot be but by Declaration; And it is more for the advantage of the parties, that it should be so construed; And the Law shall expound for the greatest benefit of the parties, when by any construction it may be: And by this means all the parts of the Will may take effect: But the three other Justices held, That he could not dispose of the rent, by reason of the said words, but of the estate of the land only: Whereupon, without any argument, they adjudged for the Plaintiff. See Lord Cokes 6. Rep. fol. 17. & 18. Sir Edward Cloeres Case, & 10. Rep. fol. 85. Lowes Case.

Termino Michaelis, anno secundo *Caroli* Regis,
in Communi Banco.

Love *versus* Playter. Paschæ 2 Car. Rot 386.

1. **A**ction for words, whereas the Plaintiff is, and had been an Attorney of the Common-Bench for thirty years. That the Defendant to deprave him, spake these words, Thou art the dishonestest Attorney in England, and if any be more dishonest than thou art, he deserves to be hanged. After Verdict upon Not Guilty pleaded, it was found for the Plaintiff, and now moved in arrest of Judgement, That these words be not actionable, because he doth not say, that he was dishonest in his practice, as Attorney: And it may be in other matters: Also he doth not aver, That there were any dishonest Attorneys in England: And the Court shall not intend it, without shewing thereof. And a president was cited betwixt Walter and Brown; Thou art as very a Thief as any is in England, and he did not aver that there was any Thief in England. No Judgement was there given for the Plaintiff; whereupon the Court would further advise. But there was no Judgement given herein, for the parties agreed.

Thomas Windsor and the Inhabitants of Farnham in Chancery.

2. **N**ote upon a reference out of the Chancery, betwixt *Thomas Windsor* and the Inhabitants of Farnham, to Sir *Randolph Crew* Chief Justice, Sir *John Walter* Chief Baron, Sir *William Jones*, and so my self. The sole Question being, whether a Decree made by Commissioners upon the Statute of 43. *Eliz. Regin. of charitable uses, cap. 4.* and exceptions put in against it in Chancery, and there examined, heard, and confirmed in part, and altered in part, may now be re-examined upon bill of Review, as other bills of Review, upon Decrees in Chancery. And it was resolved by all of us, That this bill of Review is not allowable, but the Decree in Chancery is conclusive, and not to be further examined, because it takes its authority by the Act of Parliament, and the Act doth mention but one Examination; And it is not to be resembled to the case, where a Decree is made by the Chancellor, by his ordinary authority. And *Jones* said, That so it is upon a Decree made upon the Statute of 37. *Hen. 8.* by the major part, and confirmed by the Chancellor, which is not re-examinable: And so those opinions were certified in Chancery.

Tutter *versus* Inhabitantes de Dacorum & Cashio.

Trin. 2. Caroli, Rot. 1717.

3.
Action upon the Statutes of Winton, 27. Eliz. cap. 13. of Hue and Cry, alledging the Robbery to be committed at Shely and Ridge, in divisis Hundredorum de Dacorum & Cashio in Com. Hertf. and that he made Hue and Cry, and gave notice of the Robbery at South-Himms, within the County of Midd. nêr the Hundreds aforesaid, and shews all other circumstances according to the Statutes. The Defendants plead Not Guilty, and found against them; And now moved in arrest of Judgement, that this Declaration is not good; for he alledgeth the notice to be given at South-Himms within the County of Midd. which is in another County, from that where the Robbery was committed: And he doth not say *prope locum ubi roberia facta fuit*, but *prope Hundredorum*, which may be ten miles from the place where the Robbery was done: And then it is not according to the Statute of 27. Eliz. which appoints it to be given nêr the place where the Robbery was done: And divers presidents were shewn to that purpose, viz. Trin. 30. Eliz. Rot. 1425. and Hillary 36. Eliz. Rot. 506. And likewise the words of the Statute of 27. Eliz. cap. 13. were insisted upon, That none shall have Actions upon those Statutes, except the said persons, so robbed, with as much convenient speed as may be, give notice of the Robbery to some of the Inhabitants of some Town, Village, or Hamlet, nêr the place where any such Robbery shall be committed. And so, not being alledged that notice was given to the Inhabitants, nêr the place where the Robbery was committed, it was said not to be good. But on the other side it was urged, That the Allegation, that notice was given to the Inhabitants in a Village out of the County, is clearly good, being nêr the place where the Robbery was committed; For a Stranger cannot know the division of the Counties, and so it hath bèn ruled here: And the Allegation that South-Himms is nêr the Hundred, is good enough, and may be well intended in the division where the Robbery was done; especially, it being after Verdict, and that the Jury would not have found the Defendants guilty, unless it had bèn so proved. And a president was cited, anno quinto Jacobi in the new book of Entries, fol. 348. where an Action was brought against the Hundreds of Langtrê and Crowthorn, and the Robbery was alledged to be at Colton in divisis Hundredorum prædictorum, and notice and Hue and Cry were alledged to be at Wyntchester in the division of the Hundreds aforesaid, And the Plaintiff after Verdict had Judgement, and upon view of that president all the Court conceived the Declaration to be good enough, and that the Hue and Cry being alledged to be made out of the County, was not material, being nêr the place where the Robbery was done, which place being alledged to be nêr the division of the hundred aforesaid, shall be intended nêr

the Division of the Hundreds where the Robbery was done, and not at the most remote place thereof, for that should be a foreign Intendment, But it shall be good either way; and the best course is to alledge it to be at the place where the Robbery was committed, or at the Village, near the place thereunto: But prope divisis shall be so intended, especially after Verdict: wherefore it was adjudged for the Plaintiff. vide Pasc. ann. 21. Jacobi, Rot. 488. in Banco Regis, betwixt Foster and the Hundred of Spelthorn and Isleworth, supposing the Robbery to be made apud Bodsom, prope divisis Hundredorum prædictorum, and alledges the Hue and Cry was made, and notice given to the Inhabitants of Patton, prope divisis Hundredorum prædictorum; and yet adjudged for the Plaintiff.

Rowden *versus* Malster, Trin. 18. Jac. Rot. 1051.

4. **T**RESPASS for entering into lands in Benewden: Upon Not Guilty pleaded, a special Verdict was found, That George Sterling a Cope-holder in Fee of the Manor of Benewden, anno 39. Regina Elizabeth. surrendered it into the hands of two of the Tenants of the said Manor, to the use of his Will, and had issue two Sons, John and Henry, and devised the said cope-hold lands to John and the Heirs Males of his body, the Remainder to Henry and the Heirs Males of his body, with Remainders over, &c. And afterward dyed, That this surrender was after, in anno 41. Elizabeth. presented by the Homage, and John the eldest Son admitted thereto Habendum to him and his Heirs; And afterwards John had issue three Sons, and surrendered the same to the use of his Will, and thereby devised it to Katharine his Wife for her life, and dyes, And that in anno 43. Regina Elizabeth. the said surrender was presented, and she admitted; Afterwards the three Sons of the said John dyed without issue; And they further find, That no Cope-holder may surrender, or devise his Cope-hold lands in tale. And that afterwards the said Katharine married J. S. who lets to the Plaintiff for a year, who entered accordingly, And the Defendant by the command of Henry *ousted* him, Et si super totam materiam, &c. The sole Question was, when a Cope-holder in fee surrenders to the use of one in tale, there being no custome to warrant such an entail, whether it be an Estate tale by the Statute of Westm. 2. de Donis conditionalibus, or a fee-simple conditional at the Common-Law: And it was argued at the Barr, and after solemnly at the Bench, because it was a general cause, and might concern divers Cope-holds: And Yelverton the puisney Justice held, That it was an Estate tale, by the equity and intent of the Statute de Donis Conditionalibus, although it were not within the express words thereof: For in all Statutes made for the good of the Common-wealth, and wherein no prejudice accrues to the Lord or Tenants, by reason of the alteration of any Interest, Service, Tenure, or Custome of the Manor, there the general words

words of such Acts of Parliament do extend to Cōpyhold lands. As the Statute of Merton cap. 1. which gives damages to a *Feme covert* upon a Recovery in a Writ of Dower, where the Baron died seised, extends to Cōpyholds: And the Statute of Westminster the 2. cap. 3. and the three several branches of that Statute; The one which giveth the Cui in vita upon a discontinuance made by the Baron; The second which giveth the receipt unto the *Feme* upon her Barons refusal to defend the Wives title: And the third which giveth a Quod ei deforciat unto particular Tenants, extend to Cōpyholds; and the Statute of 32. Hen. 8. cap. 9. against *Champerty*, and buying of litigious Titles, and cap. 28. which giveth an entry in lieu of a Cui in vita extendeth to Cōpyholds, because these Statutes are beneficial to the Common-wealth, and not at all prejudicial to the Lord in the alteration of Tenure, Estate Services, &c. as the Case cited in Coke 4. Report fol. 26. & 30. proves, and from whence he inferred the same conclusion, That this Statute de Donis Conditionalibus, being made for the general good of all, and the extending it to Cōpyholds, was no way prejudicial, either to the Lord or Tenants, and therefore they are to be intended within the equity and meaning thereof: Otherwise a *Formedon in descender* would not lye of a Cōpyhold, which none can have but Tenant in tail, and a Remainder limited upon such an estate, hath been allowed, and therefore is no fee conditional: For neither upon a fee absolute or conditional, can a Remainder in tale by any means depend; And as to that objection, that a Cōpyholder in fee cannot hold of the Donor, but must hold of the Lord: He said, That he might well hold of the Donor, as Coke lib. 11. Rep. Sir Henry Nevills Case, where we find, that a Manor was held by Cōpy of Court Roll, and had other Cōpyholds under it, to hold thereof, And by the same reason Tenant in tale of a Cōpyhold may hold of his Donor, and he shall hold over of his Lord. And as to the objection which was made, That if an Estate tale should be allowed in Cōpyholds, there would be a perpetuity maintained: So as it could not be cut off, he said, it might be cut off by a recovery in the Court of the Manor, as the books are in 23. Hen. 8. Brook recovery in debt 27. and 19. Hen. 6. 64. & 26. Hen. 6. 6. and Plowd. Commentaries 59. And he said he knew no reason, but a Cōpyhold might as well be intayled, as Titles of honour, which concern the person of a man, or a Villain, or liberty of franchise; And if Cōpyholds might not be intailed, it would deprive them of one of those privileges, which any man who hath an Inheritance, ought to have, viz. where a gift is to him and the heirs females of his body, if he hath a Son, his Daughters shall not inherit: And for that he vouched 37. Hen. 8. Done 61. and said, there were many Presidents and Authorities, that Cōpyholds might be intailed, and cited Littleton fol. 16. Plowden Manxels Case, fol. 2. 15. Hen. 8. Tenant in tale by Copy of Court roll 24. & anno 3. Maria, Dyer 192. and the old book of Entries 129. where are two Presidents,

the one in 3. Hen. 8. the other in 29. Hen. 8. : But on the contrary it was argued by the three other Justices, Hutton, Harvy, and myself, That this was not an estate tail by the Statute of Westminster the second, de Donis Conditionalibus, but a fee-simple conditional at the Common-Law, And then the Plaintiff hath a good title, And that the surrender to the use of his Wife for life, being after issue had, shall give to her an Estate for life, and is good, as well against the Donor as his Issue. For when an Act of Parliament altereth the Service, Custome, Tenure, Interest, of the land, or other thing in prejudice of the Lord or Tenant, there the general words of such an Act, shall not extend to Copyholds; as the Statute of Westminster the 2. cap. 20. which giveth the Elegit extendeth not to Copyhold lands, because it would be prejudicial to the Lord, and a breach of the Custome, That any stranger should have interest in the lands holden by Copy, without the admittance and allowance of the Lord. And the Statute of 27. Hen. 8. cap. 10. of uses, toucheth not Copyhold, because the transmutation of possession, by the sole operation of the Statute, without allowance of the Lord, would tend to the Lords prejudice. And the Statutes of 31. Hen. 8. cap. 1. and 32. Hen. 8. cap. 32. whereby jointenants, and tenants in common are compellable to make partition, extend not to Copyholds, And the Statute 32. Hen. 8. cap. 28. which confirmeth Leases for twenty one years, made by tenants in tale, or by the husband and wife, of the lands of the wife, touch not Copyhold lands. For that Statute warrants only the leasing of such lands as are grantable by Deed; but such are not Copyhold lands: For though by the Lords license they may be demised by Indenture, yet in their own nature they are demisable only by Copy, and therefore out of the general Purview of that Statute. And for the same reason, the Statute of tricesimo secundo Henrici octavi, cap. 34. which giveth an entry to the grantee of a reversion, upon the breach of a condition by the particular tenant, toucheth not Copyhold. So here in this Case we held, That the Statute of Westminster 2. cap. 1. of Intrailes did not extend to Copyholds, because it would be prejudicial to the Lords. For by this means the tenure would be altered, for the Donor in tale, without any special reservation ought to hold of the Donor by the same services that the Donor holdeth over. And he who comes in by Surrender, and the admittance of the Lord, to hold him and the heirs of his body, cannot hold of him who surrendered, but shall hold of the Lord, and is tenant at will unto him, and shall do the services unto him as Lord. Vide 2. Ed. 4. 6. 4. Hen. 6. 17. 41. Ed. 3. 45. & 45. Ed. 3. 19. Secondly, we held, That in respect of the baleness of their estate, the Statute never intended to provide remedy for them nor their alienations. For the words of the Statute are, Quod voluntas Donatoris in charta sua manifeste expressa de cetero observetur, which proveth, That the intent of the makers of the Statute was, That no hereditaments should

should be entayled within this Statute, but such as either was or might be given by Charter or Dæd : but Cōpy-holds are no such hereditaments, and therefore not within the meaning of that Act. And for that were cited Littleton fol. 16. 21. Hen. 6. 37. 11. H. 4. 8. 2 Hen. 4. 12. 13. Rich. 2. *faux Judgement* 7. 14. Hen. 4. 34. 7. 7 Ed. 4. 19. 21. Ed. 4. 50. Coke 4. Rep. fol. 21. And we also held that Cōpy-holds could not be entayled, because Cōpy-holders at the time of making the said Statute, and for divers years after, were only tenants at will of the Lord, and the Lord might have ousted them, and they had no remedy unless in Chancery. Thirdly if Cōpy-holds might be intayled, then the perpetuity of such estates must be maintained ; for a fine cannot be levied of Cōpy-hold lands to bar the Intayle, nor can a recovery in value be intended, of such an estate where warranty cannot be annexed unto it ; also many other mischiefs would ensue thereupon, as well to the Lord, as to the Cōpy-holders themselves ; for then the Tenants could not provide for their wives and children, nor make Leases to others for years, to bind their issue, with the Lords License ; and Lords would lose the wardship of their Tenants in such Manors where by custome they belong unto them ; and there would not be so often changes of Tenants as before, whereby Lords would lose their fines. Lastly we held, That neither estate tayle, nor estate tayle after possibility of issue extinct (which hath a necessary dependance upon an estate tayle) can by any particular custome be allowed. For no estate tayle was before the Statute de donis conditionalibus, but all inheritances were either fee-simple absolute or conditional, and the Statute being made in Anno 13. Regni Regis Edwardi primi, which is within time of memory, no custome can have commencement since then : For then a custome might begin within time of memory, which is repugnant to the rules of custome ; and in proof thereof were cited 34. Hen. 6. 36. Coke 4. Rep. fol. 87. Coke 5 Rep. 52. And in answer to the authorities vouched we said, There were none which mentioned Cōpy-hold lands to be either within the words of the Statute of Donis cond. or within the equity thereof ; besides, Plowden in Manxells Case, And that the general current of opinion in all our books is, That an estate in Cōpy-hold lands, so limited to a man and the heirs of his body, is a fee-simple conditional at the common-Law, and so Littleton and the Cases there cited ought to be intended, and agreeable hereunto are the resolutions in the Lord Coke 3. Rep. fol. 7. Heydons Case, & 9. Rep. fol. 105. Whereupon it was adjudged for the Plaintiff.

Richard Hodges, Administrator of Thomas Hodges, *versus*
Thomas Moyse and John Scriven.

Action upon the Case, whereas the Plaintiff in such a Court of Piepowders held at Gloucester, secundum consuetudinem Civitatis illius, brought an Action of debt of 200, l. against William Hodges

Hodges; and thereupon the said William Hodges, by due process of the said Court, was arrested, and under custody of the Defendants Sheriffs of Gloucester, according to the custome there, untill he should find bayl, that they permitted him to go at large, so as he hath concealed himself, and not answered him his debt. Upon Not Guilty pleaded, and found for the Plaintiff, It was now moved in arrest of Judgement, That this Action lies not: First, because it is not alledged, That the Court is there held at Gloucester by Custome, or Charter, and then it is clear they hold Court without authority, and their Process idle, and the Defendants not chargeable: Secondly, because a Court of Piepowders hath no authority to hold Pleas, but for Contracts or Batteries in Markets and Fairs, and not for debts. And to that purpose were cited Coke 10. Rep. fol. 73. & 8. Rep. fol. 133. Turners Case. Thirdly, in pleading a Recovery in an inferior Court, it ought to shew by what authority the Court is held, whether by patent or prescription; for otherwise they had no authority, and the recovery void: And all the Judges conceived, That the Court being stiled a Court of Piepowders (which is a Court incident to Fairs and Markets, and for Causes only arising within them) shall not be intended a Court, unless it be shewn to be held by Charter or Prescription; And that the Sheriff, who is to take advantage thereby (he being an Officer of the Court, and arresting the party) ought to shew it. As Stewards when they make any Certificates out of inferior Courts, ought to shew therein how the said Courts are holden, for they know best their own authority, and the omission thereof is just cause to reverse and annul all their proceedings: But otherwise it is in the case of a Stranger, as here, where the stile of the Court is but an inducement to his Action; And these words, *Secundum consuetudinem Civitatis*, being in the Imparance Roll, the Court was of opinion, that the omission of them in the Issue Roll (whereupon the Tryal was had) was but *viciū Clerici*, and might be amended: For the Imparance Roll is the principal and guide to the other, And that the addition thereof would not alter either the Issue or Verdict: And accordingly it was amended and adjudged for the Plaintiff. Vide 13. Ed. 4. 8.

Baldry *versus* Packard. Trin. 2 Caroli Rot. 617.

6. **P**rohibition, Whereas the Plaintiff sued him before the Commissary of the Bishop of Norwich, for Defamation, in which Suit he had sentence, and six pounds attested for costs, and the Defendant appealed from the said Sentence, to the Court of Arches; And all this was depending in an. 1622. And by the general Pardon anno 21. Jacobi, the offence of the defamatory words were pardoned, which was pleaded in the Court of the Arches, and that notwithstanding they proceeded in the appeal, where the first Sentence

tence was reversed, And in that Suit, sixteen pounds assessed for costs to the appellant, where by Law they ought not to have proceeded, nor given any costs. A prohibition was prayed, and it was thereupon Demurred: And after argument at the Barr debated and resolved by the Court, That here was no cause of prohibition. For, although the pardon hath discharged the offence of the defamation quoad any punishment, to be inflicted by way of penalty, or otherwise; yet in respect of the costs in the first suit, which be not discharged by the pardon (being assessed before the day to which the pardon relates (as it is agreed in Halls Case, Coke lib. 5 fol. 51.) if they be not duly assessed, the Court may well proceed in the appeal, to discharge the party of them; and if they reverse the first Sentence, so as it appears the costs were unduly taxed, and the party unjustly vexed, they may well in the appeal assess costs; for the Pardon doth not extend to stop the Suit commenced in the appeal, nor by reason of the pardon had they cause to surcease that Suit; and although the costs in the appeal, be assessed after the pardon, yet are they well assessed, the cause of those costs not being taken away by the pardon: Whereupon consultation was awarded, but Hutton doubted hereof: For the pardon discharging the offence (which is the principal) he conceived they ought not to have proceeded for the costs.

Gee, Bishop of Chichester, *versus* Freedland. Pasch.
primo Caroli Rot. 607.

R Eplevin upon a distress taken in Allingland Park upon demurrer, the Case was this: The Bishop of Chichester was seised in fee of the said Park, Jure Episcopatus, and had the office of Parkership, which the Bishop granted to the said Freedland for life, and also granted unto him for the execution thereof, an annual rent of three pounds six shillings and eight pence, una cum liberatura, of thirteen shillings four pence by the year, together with Pasturage for two horses in the said Park yearly, and the windfalls in the Park, with clause of distress for the said rent of three pounds six shillings eight pence, and the liberty of thirteen shillings four pence in all the possessions of the Bishoprick in the said County, which was confirmed by the Dean and Chapter: And for Non payment of the said rent of three pounds six shillings eight pence, the Defendant took the distress, and avers the office and the fee of three pounds six shillings eight pence to be ancient, but doth not make any such averment for the residue. The Plaintiff in barr of the Avowry confesseth the grant, and pleaderth the Statute of primo Eliz. cap. And that the said pasturage for two horses never was granted before, and that the Bishop who made the grant thereof dyed, &c. and the Plaintiff was elected Bishop, whereupon it was demurred, The sole Question was, whether this grant of the office, with the ancient fee of three pounds six shillings eight pence confirmed

confirmed by the Dean and Chapter, be good, to bind the Successor, notwithstanding the Statute of primo Elizab. or void only for the things added in the grant, or if the addition of those new things, shall make all the grant void against the Successor. After argument at the Barr, it was argued at the Bench, and held by Hutton and Yelverton that the grant was good for the office, and the ancient fee of three pounds six shillings eight pence, being in a feveral grant by it self, and not conjoyned or mixed with the other grants, and then the one may be good, and the other void: but if the grant had been of the fee of five pounds, where the other fee was only three pounds six shillings eight pence, because it is intire in the grant, it would have been void for all; But here the grant for the rent is one by it self, and the grant of the pasturage is another, and distinct by it self, and the one doth not depend upon the other; so it may be good for one and void for the other: And although the grant for the pasturage is void against the Successor, yet the rent may be good; And Hutton said, That if the Bishop had granted the office and rent for him and his Successors, and had granted the pasturage only during the time that he should continue Bishop, and so had distinguished them in his grant, there had been no Question, but both had been good; and as he by his express limitation might have limited them, and they should have been good; so the Law shall make construction, that the one is good against the Bishop himself, the other against the Bishop and his Successor; And the one being ill and void against the Successor, shall not destroy that which is good; for utile per inutile non vitiatur: And although the office it self, is not within the words of the Statute of primo Elizab. yet it is within the equity thereof. The Offices of Parkership and Stewardship, and other Offices which are of necessary use for the Bishop, are admitted and allowed to be grantable, although they be new Offices, and new fees, if they be reasonable; (and of the necessity of them, and of the reasonableness of the fees, the Court shall adjudge): And therefore in Hillary Term anno 10. Jacobi Regis Rot. 758. in the Common Bench in the Case of the Bishop of Ely, where the Bishop of Ely the twentieth of April primo Elizab. Regis. (which was presently after the Statute) granted the office of the keeping of his house and Garden, with the fee of three pounds per annum to another for his life, which was afterwards confirmed by the Dean and Chapter. Although there were not before any such Office, yet being a necessary Office, and the fee reasonable, it was adjudged good against the Successor, and not restrained by the Statute of primo Elizab. And although it hath been objected, That the livery or fee of thirteen shillings four pence, and the Windfalls, be not averred to be ancient, yet Hutton conceived, it shall be intended they were ancient, when the contrary is not averred, especially when nothing is alledged on the other part to be new, but the pasturage. And the Avowant distraining only for the three pounds six shillings eight pence, needed not to aver any other

other to be ancient, then the rent which was in question : And if one grant had been of that office and ancient fee of three pounds six shillings eight pence, and another grant pro meliore exercitacione ejusdem officii, (and for his better maintenance) of the livery, or thirteen shillings four pence, and the pasturage and windfalls. These being by such several grants, the first should be good, being distinct by itself, and the other should be void ; so by construction of the Law it shall be taken here as several grants, rather than the grant shall be destroyed : But Yelverton agreed, That if he had granted the Office for life, and had further granted for the executing thereof, these fees following, viz. the rent of three pounds six shillings eight pence, the livery or thirteen shillings four pence, the pasturage and windfalls ; and so put together the ancient rent and new addition, the grant should be void in all, because they be all in one Sentence. But here being in several Sentences, the one not depending upon the other, it may be good for the one, and void for the other, against the Successor : Whereupon they concluded Judgement ought to be given for the Avowant ; but it was argued by Harvy and myself, That Judgement ought to be given for the Plaintiff : For it is agreed on all parts, That the Statute of primo Elizab. was made for the benefit of the Successor, That his possessions might not be charged to impoverish him ; wherefore all estates and grants which are to the prejudice of the Successors, are void. And true it is, That grants of ancient Offices, with their ancient fees, which are confirmed by the Dean and chapter, are made good by the intention and equity of the Statute ; and that they shall have Officers reasonable, with reasonable fees, although they be not warranted by the words of the Statute, it being within the purview intent and meaning thereof as Coke 10. Rep. fol. 61. the Bishop of Sarums Case, which is the reason that a grant of rent or annuity pro consilio impendendo is restrained by the intent of the Statute, although it be not within the words, because the Successor is thereby impoverished and prejudiced, as be the books of 22. Elizab. Dyer 370. Cok. 10. Report in the Bishop of Salisburies Case, the Case of Bolton there cited, and Coke 5. Rep. fol. 15. and that grant of ancient Offices are taken to be within the intent of the Statute, and are to be allowed, appears, because in another Statute, made the same Parliament of primo Eliz. cap. 4. Ancient Offices are coupled with Leases, reserving the ancient rent made by the Bishop. But although grants of ancient Offices may be allowed for necessity, yet they ought not to be with a new addition, of a new charge upon the Successor, to impoverish him ; and therefore it ought to be granted as usually it had been, and not otherwise : For it is at his peril who takes such a grant, That he doth not take a new addition or alteration ; and therefore if an Office usually granted for one life, be granted for two lives, or if it be granted for life, reversion for life, and confirmed by the Dean and Chapter, it is void against the Successor, as well for the first life as for the second, because it is not granted

granted according to the usual course; and although one of the Tenants holds it during the life of the Bishop, who granted it, yet not being good at the time of the grant, the subsequent Act shall not help it. So this addition of the new charge makes the grant void, as in the Lord Montjoys Case 5. Rep. fol. 4. Lease for years of land usually demised, and of other land not demised before, reserving the ancient rent for the land formerly Leased, and twelve pence for the land not usually let, which was the full value: Yet it was resolved that the Lease was not good, by reason of that addition; and although it hath been said, That the livery and pasturage are distinct clauses, from the first grant of the rent, and not depending upon, nor conjoyned with it, so that the rent may stand, and for the other it shall be void; it was answered, That it appears fully they be one intire grant, and not several: For the rent is granted *una cum liberatura*, or thirteen shillings four pence, & *una cum pasturagia*, which is a Copulative, and one Sentence. See the books 8. Hen. 7. 4. and 38. Hen. 6. 34. in the Abbess of Syons Case: And for the thirteen shillings four pence or livery, it is conjoyned in one clause of distress, with the rent of three pound six shillings eight pence, so as they be but one grant, and upon one consideration; but if they had been in another clause, or that for another consideration, he had granted the said livery of 13. s. 4. d. and pasturage; then the grant might stand for the one, and be void for the other: And where it hath been objected, That the livery and windfalls, although they have not been sufficiently averred to be the ancient fees, yet may well be so intended; for as much as the contrary is not shewn on the other side. It was answered, That the Avowant (because he is to make his title) ought to averr the several things granted to be ancient fees to the Office, otherwise the averring that the one is ancient, doth imply that the other is not ancient: For a Plea shall be taken most strong against him who pleadeth it, and in proof thereof see Plowd. Commentaries 46. & 103. and Coke 1. Rep. fol. 46. and 5. Rep. fol. 9. in Brudnells Case; And it sufficeth the Plaintiff to alledge that any of them is a new addition, and he needeth not to alledge the residue to be new, for then peradventure it would be double. Also, for the principal point in the Case; These additions trench to the prejudice of the successors, and this Statute hath been alwayes construed to redress the mischief which was at the common-Law, upon Grants confirmed by Dean and Chapters in charge, or to the prejudice of the Successors, and to make them void, as appears. Coke 5. Rep. fol. 2. & 3. And Michaelm. 40. & 41. Elizab. betwixt Scambler and Wats, where two offices of Steward or under-Steward of a Manor, usually granted severally, with several fees, were held void for both. Also to both offices the ancient fees are appendant, and partell of them, and shall pass by Grant of the Office *cum pertinentiis*: But those fees newly added, cannot be said appertaining, nor partell, to be recovered by assise, as the Case in Coke 8. Rep. fol. 49.

John Webbs Case, and the book of 39. Assise fol. 4. proves: Therefore the Grant being of more than was anciently granted, was void. And to expound this Grant of the Office with new fees, to be good for all, during the time that the Grantor is Bishop, and to be afterwards good in part, and void in part, against the Successor; and so to make fractions of Grants, is against the exposition of Grants, and against all former constructions and interpretations of this Statute; And therefore they conceived, That this Grant was void in all ab initio, quoad the Successor, and the Plaintiff ought to have Judgement.

Robert and William Eyres against the Executrix of
Christopher Eyres, in Chancery.

IN a Suit in Chancery, this case was made, and referred to the *Master of the Rolls, Justice Doddridge, Justice Jones, and my self*, and to *Mr John Ward, and Doctor Lee Masters of the Chancery and Civilians, Christopher Eyres the Testator anno 15. Jacobi Regis* made his Will in writing, and thereby devised Legacies to charitable uses, and to the Plaintiffs *Robert and William Eyres* his Brothers, to the one two hundred pounds, and to the other one thousand pounds, and divers other Legacies to his other Kindred, and made his Wife Executrix, saving that he appointed his said two Brothers to be conjoyned with her, as Executors in trust for his Wife, for performance of his Will: And afterwards in anno 22. Jacobi, he being sick and sending for *Mr. Dampert Parson* of the Parish, and for *Mr. Stone* a Reader of the Temple; they when they came, demanded of him what Friend he thought best to be his Executor, to take care of his Funerals, and see his Will performed? and whether he trusted any person more than his Wife? he answered, That his Wife was the fittest person, and therefore should be his sole Executrix. Being then moved by *Mr. Stone* to give Legacies to his Father, Brethren, and Kindred, he answered, he would not give or leave them any thing, but he bequeathed to *Lionell Atwood* his Godson twenty or thirty shillings; and being thereupon requested by his Wife to give him a greater Legacy, he answered her, *Thou knowest not what thou doest, do not wrong thy self, thirty shillings is money in a poor bodys purse*: And for others he left them to his Wives discretion or disposition; and the Testator did speak these words, or the like in effect; *Animo testandi & ultimam voluntatem declarandi*: And all this was set down in a Codicill, and the first Will and that Codicill proved in *communi forma*: And whether this Codicill were a revocation of the first Will, for the Legacies given to his two Brothers, now Plaintiffs, was the question; and after divers arguments, as well by the Civilians as common Lawyers, it was resolved by them all, and so certified under their hands, That they conceived it was not a revocation of the said Legacies; but they did not certify their reasons. The principal reasons of their said resolution were, because there was an absolute and formal Will made in his health, and there being

13.

no speech made by him of his former Will, nor of the Legacies thereby devised to his Father, Brothers, and Kindred, nor that he seemed to remember his former Will. That answer to a doubtful question, shall not take away the Legacies devised before ; For *non constat* what his intent was in using those words ; for it may be his meaning was not to give more than he had given before, or that he would not give more at that time, by that Will, and *non constat*, That he heard all the words, when he was moved to give to his Father, Brethren, and Kindred ; and he answering, I will not give them any thing, *non constat* what he intended by those words : and therefore upon such doubtful speeches, to nullifie a Will advisedly made, without cleer or perspicuous revocation, or words which *tant amount* shall not be permitted : Also the Civilians affirmed, that there is an expresse Canon ; there cannot be a revocation of Legacies amongst Children, without precise mentioning the first Will, and Legacies given thereby to the Children ; and they said, the Law is taken to be so, when he hath not any Children, and deviseth Legacies to his Brothers ; and there doth not appear any cause of misdemeanour, to provoke him to revoke his Will, nor do his words import any such intention. So upon these opinions, the Lord Keeper being assisted with the Master of the Rolls, and the said three Justices decreed the said Legacies to the Brothers, the said Codicill not having made any revocation of them.

9. **M**emorandum upon Friday being the tenth day of November, Sir Randolph Crew Chief-Justice of the Kings-Bench was discharged of that place, by writ under the great Seal, for some cause of displeasure conceived against him, but for what, was not generally known.

Powell *versus* Plunket, in the Exchequer Chamber.

10. **E**rror in the Exchequer Chamber of a Judgement in the Kings Bench, in an Action by Plunket for these words spoken by the Wife ; Mr. Plunket did steal my Plate out of my Chamber. The Defendants pleaded that they were possessed of such plate, which was stoln out of their Chamber, and she suspecting the Plaintiff to have stoln it spake those words, and it was demurred thereupon, and adjudged for the Plaintiff ; and this Error assigned, That the Declaration was not good, for a *Feme covert* cannot have plate, but it is the plate of her Husband, so the words are insensible, and not actionable : But it was resolved by all the Justices and Barons, that the Action well lies ; for although she may not have plate, yet it is in common speech well known, That the Wife accounts her Husbands goods her goods, and so what she intended by those words is a great slander, and the justification clearly ill ; for suspicion is no good cause to justify the speaking such words ; Whereupon the Judgement was affirmed.

Morris

Morris *versus* Fletcher, in the Exchequer Chamber.

Error of a Judgement in the Kings Bench in an Assumpsit, where the Plaintiff alledged, That in consideration he would marry the Defendants Daughter, the Defendant would pay for the Wedding Apparel; and the Plaintiff alledged, that he married the Defendants Daughter, and provided for her two Gowns, and two Pettycoats, and that the Defendant licet sapius, &c. the Defendant demurred upon the Declaration and Judgement given for the Plaintiff. The Errors assigned were, First, That he ought to pay only for one Wedding Gown and Pettycoat, which she used upon her marriage day, and not for more; and intire damages being given, the Judgement was erroneous: But all the Justices and Barons conceived, That Wedding Apparel is to be taken according to the common parlance, for apparel to be used upon the Wedding day, and time of feasting, which is commonly for some daies after, according to the dignity of the persons; and therefore the declaration was held good, and the damages well assessed. The second Error assigned was, the Defendant appeared by John Green his Attorney, in octabis Hillarii anno 22. Jacobi Regis, whereas the said John Green was dead before the day, which was alledged to be confessed by pleading, *In nullo est Erratum, sed non allocatur*, for it is an Error assigned against the Record; and although it was said there ought to have been a special demurrer for that cause, yet it was held, that the *In nullo est Erratum*, alledged against the Demurrer, extends to the three Errors assigned in the Writ of Error. The third Error was, That the Writ of Inquiry of damages was awarded returnable *Die lune post quinden. Hillarii primo Caroli*, and the Sheriff returned the inquisition taken before him 27. die Januarii, which was after the day of the return of the Writ, and so without authority; But for as much as it was not assigned upon the Record although in truth it were so, the Court would not take consaunce thereof: And it may be that *die lune post quinden. Hillarii*, was the 28. or 29. day of January, and then the inquisition is well taken, and so it shall be intended; and if not, the Court shall not take notice thereof, unless it had been assigned; Whereupon the Judgement was affirmed.

11.

Edward Davie *versus* John Hawkins, in the Exchequer Chamber.

Trespas of his Close breaking and depasturing with his Cattle. The Defendant justifies, for that one Will. Birchmore was seized in fee of a Messuage and Tenement in D. and he and all those whose Estate, &c. the said Edward Davie had in the said Tenement, had used common (and so mistakes Edward Davie for William Birchmore) and that the said William Birchmore let those

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Tenements to the Defendant, who put in his Cattle upon the Common; the Plaintiff replies and traverseth, absque hoc, That the said William Birchmore, & omnes illi quorum Statum prædictus Edwardus habuit in Tenementis, &c. (and so mistakes Edward for William) and thereupon issue joyned in the same manner, and the Verdict found, That the said William Birchmore, & omnes illi quorum Statum idem Edwardus habuit non habuerunt communiam prout, &c. Judgement was given for the Plaintiff, and Error thereof brought in the Exchequer Chamber, and this matter assigned, that it is a vain prescription, and none ought to prescribe in the party, in whose right common is claimed in him, or his Ancestors, &c. And to alledge a Quæ Estate in the party, is idle and repugnant, and the Verdict finding it, is void in it self; And so the Judgement given thereupon was erroneous, but it was moved, that it was but a misprison of the Clerk, and the Defendant may not take advantage of his own insufficiency in his plea, and prayed that it might be amended, according to the Case of Sir Anthony Cook in 9. Eliz. Dyer. 160. 11. Hen. 7. 2. But Sir John Walter Chief- Baron, Yelverton, my self, and others, conceived it could not be amended, because it is in matter of substance in all the proceedings, and in the Verdict, &c. but Hutton and others doubted thereof, whereupon the Defendant in the Writ of Error, for his expedition, and that he might proceed de novo, moved by Mr. Taylor his Counsel, That it should be reversed, and so without further argument it was reversed.

Player *versus* Warn and Dewes, in the Exchequer Chamber.

8. **A**ction upon the Case *Sir Trover & Conversion* of 2000. loads of Coals. Upon Not Guilty pleaded, the Defendants were found guilty severally, for several loads of Coals, and were found severally not Guilty for the residue, and judgement accordingly, and intire costs, and one ideo in misericordia against the Defendant, and one ideo in misericordia against the Plaintiff, pro falso clamore; And thereupon a Writ of Error was brought in the Exchequer chamber, and the Error assigned; Because the Judgement was against both the Defendants, for the several damages severally: For it was alledged that several damages ought not to have been assessed; but there being a joynt Trover and Conversion layed to their charge, they ought to have been both found Guilty, and they ought not to have been divided in the Verdict and in the assessing of damages; and if they might be severed, yet the Plaintiff ought to have but the damages given against one of them as it is in Sir John Heydons Case Coke Rep. 11. fol. 5. & 44. Ed. 3. 7. But all the Justices and Barons agreed, That the Plaintiff should have several damages; for being found severally guilty of several parcels converted, he shall have Judgement accordingly, and it is not like Sir John Heydons Case, where there was but one

one joynt and sole trespass of Battery, and so found, and there, although the damages were severally assessed, yet the Plaintiff ought to take his Judgement for damages but of one : But when the Trespass is several, and so found, as in this Case, viz. the one at the one time, and the other at another, although it be contrary to the supposal of the Writ, yet being found by verdict, it shall not abate the Writ, and the Plaintiff shall recover according to the Verdict, as it is said there in Heydons Case : So here this being severally found, and the conversion by them severally, of several things, the damages are well assessed severally, and he shall have Judgement against them severally for damages, according to the Verdict : And it was said, that there were divers presidents in the Kings Bench, and Common Bench, to that purpose. The second Error assigned, was, That there ought to have been several Judgements de iedo in misericordia against the Defendants, and being otherwise it is Error : But against that it was also resolved, That there shall be one Judgement only of Misericordia although the Defendants be severally found guilty, and so are the Presidents : Whereupon the Judgement was affirmed, Vid. 44. Ed. 3. 6. & 6. 9. Hen. 6. 2. 22. assises 76.

Sir John Bennet *versus* Doctor Easedale.

AN Affise being brought by Sir John Bennet, for the office of Chancellorship of the Arch-bishop of York, the Defendant endeavoured to obtain an injunction out of the Star-chamber to stay his the said Sir John Bennets Suit, he having lately by Sentence and Decree there (for bribery and other misdemeanours in his office of Judge of the Prerogative Court) been fined twenty thousand pounds, and censured to be imprisoned, and made incapable of any office of Judicature. By reason whereof being disabled to hold that office in question, the Defendant obtained it, and pretending, this Affise was brought by Sir John Bennet, that he might enjoy the said office contrary to the Decree ; he therefore prayed to stay his proceedings ; Whereupon Sir John Bennet having day given him to shew cause, why an Injunction should not be granted, shewed then a pardon from the late King after the said Sentence, wherein was recited all the bribery and offences contained in the said Decree, and all penalties and punishments by reason thereof, and all disabilities and incapacities, and all things concerning the said Sentence, except the said fine of 20000 l. ; and thereupon the Court of Star-Chamber requested Sir John Walter, Chief Baron, and Sir Francis Harvie (third Justice of the Common Pleas) to call unto them all the Justices and Barons, and to consider of the said Decree, and Pardon, and to certifye their opinions, whether it were fit to permit the proceedings in the Affise or not ; and all the Justices and Barons being assembled at Serjeants Inne, the Sentence and Pardon were read before them, and the case argued by Counsell on both sides ; and it was resolved by the Justices

14.

Justices and Barons, That this pardon hath taken away all force of the Sentence in the Star-Chamber, except for the Fine of 10000 l. and all inabilities are discharged thereby, and that the Sentence never took from him the office, but the execution thereof, nor gave authority to place others : But if the Archbishop, before the Pardon, and after the Sentence, had appointed him to execute his office, and he durst not do it ; then peradventure the said Archbishop, for his *non attendance*, might have seised the said office, and have granted it to another ; but the Sentence by it self cannot take away the office, which is a Freehold ; and the pardon having taken away all the offences, they therefore conceived it convenient to permit him to proceed with his Assise, and if doubtful, it may be found specially, and so receive a judicial hearing.

15.

Memorandum after the death of Sir Henry Hobert Knight and Baronet, Chief Justice of the Common Bench, Sir Richard Hutton late as Prime Judge *At Hillary Term* following, and in both the Terms of *Pascha* and *Trinity*, and untill the last day of *Michaelmas Term*, viz. 28. *Novembris secundo Caroli*, when Sir Thomas Richardson was made Chief-Justice of the said Court, and all the Writs which issued the said *Michaelmas Term* from *Quindena Sancti Martini* unto the end thereof, did bear Teste as well under the name of the said Sir Richard Hutton as of the said Thomas Richardson.



Termino Hillarii, anno secundo *Caroli* Regis,
in Communi Banco.

Hearn *versus* Allen, Trin. 22. Jac. & Hill. 1. *Caroli*, Rot. 1876.

Ejectione Firmæ of two Acres of Medow in Kingham of the demise of Anne Keene, upon the 26. day of March, anno 21. Jacobi Regis, for 7. years, from the Purification before the Ejection. Upon Not Guilty pleaded, a special Verdict was found, That one Richard Keene was seised in fee of a Messuage, and of two Acres of Land in Chipping Norton, and of the said two Acres of Medow in Kingham, and used and occupied the said two Acres of Medow, being four miles distant from the said house, together with his lands and tenements in Chipping Norton, and held them all in Socage, and being so seised, upon the 20. day of May anno 6. Elizab. Regina, by his Will in writing, devised the said house, cum omnibus & singulis pertinentiis ad inde vel aliquo modo spectantibus Thomæ Keene, filio suo, & hæredibus suis in perpetuum, Et pro defectu hæredum prædicti Thomæ Keene, to Anne Keene daughter of the said Richard Keene, and to her heirs for ever. And for default of the heirs of the said Anne Keene, tunc prædictum messuagium cum pertinentiis, Johanni Keene consanguineo suo, & hæredibus suis, in perpetuum. And the said Richard Keene by the said Will devised, omnes terras suas, & omnia bona sua mobilia & immobilia to Elizabeth his Wife during her viduity, and the said Richard Keene afterwards died, the said Thomas Keene being his Son and Heir; and that the said Elizabeth entred, and was seised, and that the said Thomas Keene entred into the said two acres of Medow, and disseised the said Elizabeth; And afterwards upon 12. Decemb. anno 37. Elizabeth. Regin. infeoffed thereof Edward Keene with warranty against him and his heirs, and that Thomas Keene died without issue, and that the said Anne, Daughter to the said Richard Keene, was his Sister and Heir; and that afterwards Edward Keene being so seised, devised that land to Anne his Wife for her life, and dyed, and that the said Anne Keene entred, and let to the Plaintiff, who entred, and the Defendant ejected him, Et si super totam materiam, &c. This Case was argued at the Barr; First, whether by this devise of Richard Keene of the Messuage cum pertinentiis, those two acres of Medow passed, being used with it; and all the Court conceived they did not pass, because by the words cum pertinentiis, land passeth not, but only such things which properly may be pertaining: Otherwise it is, if it had been cum terris pertinentibus, then that which was used to it, would have passed;

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but

but by the bare words cum pertinentiis, without other circumstances to declare his intent, they shall never pass, Vid. Plowd. Hill. and Granges Case 23. Hen. 8. 6. The second Question was, admitting they pass, whether it be an Estate tail in Thomas and the Remainder in Anne (under whom the Defendant pretends to claim as it was affirmed) or a Fee-simple in Thomas and the Remainder void; For it was agreed, That if the Remainder had been limited to a meer Stranger, the first estate had been a Fee, and the Remainder void, as it is 19. Hen. 8. & 29. Hen. 8. Dyer 33. because no intent appears to make an estate tail, but a Fee-simple, by the words, and then the Remainder over is void: But here when it is limited to the Brother and his Heirs, and if he dye without Heir, to his Sister, who is his Heir, to whom he intended it should go; Those words shew what Heirs he intended, viz. Heirs of his body; wherefore by his intent an Estate tail was to be created. But in this point Richardson, Hotton, and Harvie conceived it to be a Fee, and not an Estate tail, and the Remainder to be void, but Yelverton and my self held the contrary, and that such construction should be made, as should make it agree with the intention of the party; but they all agreed; there was a collateral warranty descended, which barred the Remainder, and not a warranty commencing by disseisin, as was objected, Vid. Coke 10. Rep. fol. 95. Seamors Case. But because no title is here found at all for the Defendant, but *primer possession*, the matters in Law cannot come in issue; and therefore, quacunqve via data, Judgement ought to be given for the Plaintiff; And Judgement was given accordingly.

Smith *versus* Ashe and his Wife.

2. **F**OR a Debt due by the Wife before marriage, the Husband was returned out-lawed, and the Wife waived, but before the return of the Exigent, one Elwise an Attorney procured for the Wife a Superfedeas, surmising that the said Wife had appeared by him as her Attorney; And it was now moved by Henden, that this appearance of the Wife should be received; And all the Court conceived, That if upon the Exigent the Sheriff had returned reddidit se, or upon pluries capias had returned cepi corpus for the Wife, then her appearance should be entered, but not by Attorney as it is here, and the Exigent should issue only against the Husband, Et idem dies should be given to the Wife. But when the Husband upon the Exigent is returned outlawed, then it shall be entered *Ales sans jour* for the Wife, for the Process is determined, and if he will purchase his pardon, he shall not have any allowance thereupon in a Scire facias, unless he appeared for himself and his Wife; but if for the Husband the Sheriff should return Cepi corpus upon a Pluries capias, and a non est inventa for the Wife; yet an Exigent shall issue against both, because it is intendable the Husband might bring in his Wife; but if upon the Exigent the Sheriff returned reddidit se for

for the Husband, and for the Wife, and she is waived, the Husband shall go fine die; But in this case because the Exigent was returned against both, to be outlawed, the Superedeas, supposing the appearance of the Wife, is merely idle and void, whereupon it was disallowed, and the Exigent appointed to be filled against both, Vide 40. Ed. 3. fol. 34. 43. Ed. 3. fol. 18. 14. Ed. 3. 1. 3. Hen. 6. fol. 14. 34. Hen. 6. fol. 29. 14. Hen. 6. fol. 14. 10. Elizab. Dyer 271. 11. Hen. 4. 71. & 89. 9. Ed. 4. fol. 23. 18. Ed. 4. fol. 4.

Sir Henry Mildmay's Case, in the Exchequer Chamber.

SIR Henry Mildmay as Administrator of Sir Thomas Mildmay, brings Error of a Judgement given against him in debt, upon an obligation, where plene administravit was pleaded, And now whether it shall be allowed without bayl, upon the Statute of 3. Jacobi cap. 8. because the words of the Statute are general, In every Action, was the question, But because the Plaintiff brings Error only as Administrator, and the Judgement against him was not for his proper debt or case. It was resolved by all the Court, That he is out of the intention of the Statute, although he be within the words, it being against reason he should be put to Mainprise, and make that his proper debt, where he brings only the Suit as Administrator; whereupon it was ruled accordingly; That the Writ of Error should be received, and a Superedeas awarded for the execution, without putting in bayl; and so Wright the Clerk of the Errors said, was the common practice upon that Statute.

3.

Sir Charles Howards Case, in the Exchequer Chamber.

UPON conference with all the Justices and Barons in the presence of Sir James Ley Earle of Marleborow Lord Treasurer, who commanded them to be assembled: It was resolved in a Case out of the Exchequer Chamber, upon an Information by English bill, against Sir Charles Howard, whereas the King was seised in fee of a Park called Putney-moore-clap, and King James by his Letters-patents under the great Seal, granted officium custodis of the said Park to Sir Charles Howard, habendum to him the said Office cum omnibus Vadiis, Feodis, Windfall-trees, Profits and Commodities thereto belonging in tam amplis modo & forma prout aliquis alius officarius illud exercens habuit, tenuit, & occupavit, seu gavissus fuit, & etiam pro consideratione predicta, granted unto him an annuall Fee of thirty pounds per annum, issuing out of all his Majesties Manors in that County habendum to him for life: Afterwards the King which now is, by his Letters-patents under the great Seal, published his pleasure for disparking the said Park, and grants all the Dēre therein to Sir Richard Weston Chancellor of the Exchequer, with liberty to take and carry them away, &c.

4.

The first question was, whether by these Letters-patents the King may dissolve the Parks and if those Letters-patents be a dissolving of the Park. The second question was, admitting the Park be dissolved, whether the Office of the Keeper be determined, and if determined, whether Sir Charles Howard may have any remedy for the casual fees and profits. Thirdly, admitting the Park be dissolved, and the Office determined, whether the fee of 30 l. per annum granted in consideration of exercising the said Office, be also determined. It was argued by the Attorney General for the King, and by Mr. Andrews Reader of Lincolns Inne for Sir Charles Howard, and afterwards the Justices and Barons gave their resolutions. For the First they all agreed, That the Park is well dissolved, and shall no more be accounted a Park, all the Dēere being destroyed, for a Park consisteth of Vert and Venison and Enclosure; and if it be determined in any of them, it is a total disparking; and notwithstanding the grant of the Office the owner may well dispark it, according to the opinion of Wythers Case 6 Ed. 6. Dyer 71. Secondly, they all held, That the Park being dissolved, the Office dependant thereunto is determined, and the Grant of the custody thereof hath not any remedy; for it being the will of the Owner of the Park to dispark it, and to destroy the Dēere, the custody is then Determined, for he cannot be Keeper where there be neither Dēere nor Wood, but all destroyed. And although it be true, that an Officer who hath the grant of an Office for life, or years, and is to have the profit of casual fees, as Steward, Bayliff, or Parkership, (as it is in 31 Hen. 8. grants Broke. 134. & 34 Hen. 8. grants 93. cannot be discharged of the Office, for then he should not have his casual fees; that is to be understood that the Grantor cannot appoint another, where the Park or Manor alwaies continues, as 18 Ed. 4. fol. 9. resolves: But when the Park it self is determined and disparked, the Office which is appendant thereunto, shall be also determined; but so long as the Park continues a Park, he may not discharge him of the Office, and make another Officer. Because he hath that office for his life, and the profits thereof consist in casualties, but the office of a Keeper is in respect of the keeping of the Park, and his casual profits are in respect of his pains and attendance upon the game, and the keeping thereof; and it is to be intended, that at the beginning of that Office, they were only granted in respect thereof, and in continuance of time they are become appendant to the Office; and when the Park is destroyed, so as there needs not such attendance, then cessante causa cessat effectus: As if one grants the Office of Steward with all profits of Courts; if the Manor be destroyed, the office, and with it, the casual profits are determined also: So here the Park and liberty of the Park being determined, the office is determined in it self. The third question (admitting the office to be determined) whether the annual fee of 30 l. being granted in consideration thereof, issuing out of the Kings Manors in the County of Surrey,

Surrey, be also determined, and Sir John Walter Chief Baron held clearly it was, but all the other Justices and Barons dissented from him in this point only, because it is granted by a distinct clause, and not out of the Park; and although the office be determined, yet because it is not by the act or default of the Grantee himself, but by the act of the Grantor only, they conceived the Grantee should enjoy that annuity, Vid. 5 Ed. 4. fol. 8. 7 Ed. 4. 22. Plow 457. Sir Thomas Wroth's Case & 381. Sir Henry Nevils Case.

Sir Gregory Fenner *versus* Nicholson and Pasfeild,
Hill. 22. Jacobi Rot. 239.

SIR Gregory Fenner brings a Quare Impedit against Nicholson and Pasfeild, and the Bishop of London, as Ordinary for the Church of Chelmsford, and shews that Sir Thomas Mildmay was seized, and presented Pasfeild, and let the Manor, to which the Advowson is appendant, to the Plaintiff; And that the Church became void by the resignation of Pasfeild, by reason whereof it belonged to him to Present; The Bishop pleaded nothing but as Ordinary, Pasfeild entitles himself unto it, by presentation, as to an Advowson in gross, and traverseth the appendency; whereupon the Plaintiff taketh issue; The Defendant Nicholson pleaded as Parson Imparsoner of the Presentation of the King; and confessing the title of Sir Thomas Mildmay, and the Lease for years of the Manor made to Sir Gregory Fenner, pleads over, That the said Sir Thomas Mildmay pro quadam pecunie summa, betwixt him and one John Josselin, presented the said Pasfeild, and pleaded the Statute of anno 31. Regni. Eliz. cap. 6. which makes a Presentation upon Symony, and the Institution and Induction thereupon to be void, and that the King should have the title to Present. So by reason of this Presentation, made by Symony, it is void and belonged to the King to Present; who Presented the Defendant Nicholson, who was Admitted, Instituted and Inducted; and traverseth, That the Church became void by the resignation of Pasfeild, pro ut, &c. And thereupon it was demurred and shewn for cause, That the Travers was insufficient to Traverse matter not Traversable, and that this plea is double. It was argued at the Bar by Henden, That this Travers is ill, because the Presentment is the principal, which being confessed and avoided, cannot be traversed: For the avoiding and traversing make it double, and that being specially shewn for cause of Demurrer, and the other joyning in the Demurrer, judgement ought to be for the Plaintiff. Also the pleading of the Symony, That pro quadam pecunie summa, It was agreed, &c. And not shewing for what summa, is uncertain and ill. But all the Court conceived, That the Plea was good; For the Plea maketh the Travers but argumentative that he might not resign, And being alledged that the Church is void, per mortem vel resignationem, or otherwise, it ought to be Confessed or

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Traversed; For that is the cause of his Presentment, and the issue ought to have been taken Si vacavit per mortem, vel deprivationem vel resignationem; For the Presentation, Admission and Institution are but conducting to the resignation, and the resignation or avoidance is the chiefest matter. Vide 23 Eliz. Reg. Dyer 376. Coke lib. Entran. fol. 499. Sayes Case. Such issue, Si vacavit per mortem, and Hillary 15 Jacobi, Rot. 2091. Palchalls Case. In Quare Impedit, Simony was alledged and Presentment by the King by reason thereof, &c. and traverseth the vacancy per mortem. Mich. secundo Caroli Reg. Presentment for Simony was alledged to be made and concluded with a Travers of the vacancy per mortem. So are the presidents, That the issue may be entred upon the avoidance, viz. If it be pleaded per mortem, deprivationem, vel resignationem, as the principal matter traversable, according to the presidents in the book of Entries, 485. 490. 511. whereupon judgement by consent was resolved to be given for the Plaintiff, against Pasfeild, he relinquishing his Plea, and confessing the Action, and upon the Demurrer Judgement should be given for the Defendant, and so it was, and release of Errors on both sides.

Fotherbies Case.

6. **P**rohibition by Fotherby Administrator of Fotherby, for suing in the Ecclesiastical Court, against him as Administrator, to make distribution of some part of the personal estate, to the sister and heir of the intestate, surmising that by the Law of the Land, The Administration being committed to the intestates wife, The Ordinary hath no authority to intermeddle with making distribution of the goods of the Intestate, to the children or kindreds. It was strongly urged by Serjeant Henden, and Serjeant Finch, That such Prohibition is not allowable: For when one dies intestate, the usual course hath been, for the Ordinary, after all debts paid, to give order for the distribution of one part of the goods to the wife, and another part to the children; and if he hath not any children, then to his kindred. But Hutton said, It is not reasonable, nor stands with Law, That the Ordinary should assume such a power, For by the Statute of 31 Ed. 3. cap. 11. the Ordinary is compellable to commit Administration, And the Administrator is only chargeable, and the Ordinary hath no more to meddle with it, and it would be mischievous if the Ordinary should compel him to make distributions; For peradventure he may be chargeable with Actions of debts unknown, after good accompt; Also the Administrator by the Administration of the goods committed unto him, hath an absolute interest in them, with which the Ordinary hath not to meddle; And although, at the Civil Law, the Administrator was accountable, as servant to the Ordinary, and might be discharged by him, and a Repeal might have been of the Letters of Administration at the Ordinaries pleasure; yet at this day, especially,

ally after the Statute of 21. Hen. 8. The Administration being duly committed by the Ordinary, cannot now be repealed, and if there be a suit to have it repealed, a Prohibition lies, And divers Prohibitions in such cases have been granted; And as to the Case in question, he said, he knew when he was at the Barr, and since he came to the Bench, That divers Prohibitions had been granted, where the Administrator was sued to make distribution; As in Clerks Case and Mich. 20. Jac. Reg. Rot. 2196. For Jane Swyfe Administratrix of Hugh Swyfe, she being bound in an obligation of 200*l.* to the Ordinary, to make true Administration, exhibit a true Inventory, make a perfect account, and to distribute the Surplussage after all debts and legacies paid, at the appointment of the Ordinary; and being sued before Doctor Seaman, Commissary to the Bishop of Gloucester, to make distribution, moved for a prohibition, which was granted upon good advise, by a ward of the Court. So hereupon a prohibition was likewise granted In Trin. 14. Jac. Reg. It was resolved by Hobert, Warberton, Winch, and Hutton in the Case of Tucker, That a prohibition should be granted to the delegates in an appeal of such Sentence from the Ordinary, for adjudging to make distribution, and Mich. 20. Jac. Rot. 2196. & Hill. 9. Jac. Rot. 1608. for Watts. See after Levannes case, Term. Mich. 6. Car. pag. 201.

Sydney *versus* Doctor Mundford, in the Exchequer Chamber.

ERROR in the Exchequer Chamber of a Judgement in the Kings Bench. The Error assigned was, for that Doctor Mundford brought Trespals for three loads of Dates taken at Tewing 20. Septembris anno vicesimo Jacobi Regis, the Defendant justifies; because the place where, &c. is parcel of a Coppelhold in Tewing, and makes title to it, and justifies for *damage feasant*: The Plaintiff shews, that long before the time when, Et *prædicto tempore quo*, &c. he was Parson of Tewing, and that the place where, is within his Rectory, and the tythable places thereof; And that the Defendant being a Coppelholder there, the 20. Septemb. anno 20. Jacob. Reg. let it to one Hawkes, to have it from year to year, *quamdiu ambabus partibus placeret*; And that Hawkes entred, and plowed, sowed, took the crop, and set out the said Dates for his Tythes, and the Defendant *de injuria sua propria*, took the Dates *prædicto tempore quo*, &c. The Defendant maintaining his barr, traverseth the Lease, and it was found for the Plaintiff, and Judgement for him; and now Error assigned, for that he alledged he was Parson *tempore quo*, &c. and at the time of the trespasses supposed, *ac diu antea*, but doth not say, that at the time of the severance of the Corn he was Parson, for it shall not be intended without shewing it, but rather that he was Parson at the time of the Trespals, and not at the time of the severance, and then he makes not a sufficient title unto them; But all the Justices and Barons conceived it was well enough, and shall be intended by all the circumstances, that he was

was Parson at the time of the Seberance; for it is said, antea & tempore quo fuit Parson, & adhuc est, &c. and especially the Defendant having admitted that he was Parson, and the said Cythes due unto him, and making traversers to the Lease, which was an idle traversers, and therefore good cause of demurrer, and the Replication is good; for being pleaded that diu antea & tempore quo, &c. he was Parson, it is certainly enough intended, he was Parson at the time of the Seberance, as well as at the time of the taking, whereupon Judgement was affirmed, notwithstanding the book 35. Hen. 6. fol. 48. which was much insisted upon.

The Earl of Lincolns Case, in the Star-Chamber.

8. **M**emorandum, That upon the 13. day of February anno 1626. in the Court of Star-Chamber, all the Justices of both Benches being there (besides Justice Doderidge) and all the Barons of the Exchequer, and a very great assembly of the Lords, viz. The Lord Keeper, Lord Treasurer, Lord President of the Council, the Duke of Buckingham, The Earl of Pembroke, Lord Steward, the Earl of Suffolk, Earl of Carlile, Earl of Holland, the Lord Chancellor of Scotland, The Lord Conwey Principal Secretary, the Lord Carlson, and divers others of the privy Council; It was moved, whereas Sir Henry Fines Knight, had exhibited his bill in the Star-Chamber against the Earl of Lincoln, for divers Riots and other Misdemeanors, and the Earl of Lincoln had taken a Commission forth, to put in his answer upon oath in the Country, and he offered before them his answer upon his honour, but would not put it in upon oath, because he was a Peer of the Realm; which matter being now reported by the Commissioners, It was now moved by the Kings Soliciter, to have the resolution of the Court: And it was held by all the Justices, who delivered their opinions *seriatim*, That the Lords in Cases criminal (especially where the King is party) ought to put in their answer upon oath; and in all cases where they are to be Witnesses betwixt party and party, they ought to be sworn; and the Lord Keeper said, *Quod in Judicio non creditur nisi juratus*, and that he had caused presidents to be searched, and had found divers since the first of Queen Eliz. wherein Peers of the Realm being impleaded in Chancery, or Star-chamber, or Court of Wards, have been alwayes sworn: And he said when a Peer affirms any thing which is not true upon his honour, there is not any remedy, but if he affirms that which is false upon his oath, there is remedy, by the Statute of 5. Eliz. cap. 9. against perjury, wherefore they all resolved that the Earl of Lincoln ought to be sworn; and of the same opinion were all the Lords and Counsellors, which they delivered *seriatim*, *nullo contradicente*, because it is *Juramentum purgationis*, and not *promissionis*; and Princes are sworn to all their leagues and confederacies, which is called *Juramentum confirmationis*, neither is it any diminution to the said Earls honour, to be sworn about that, which he would not should be put upon his honour.

Suttons Case.

Sutton Chancellor of the Bishop of Gloucester, moved for a Prohibition, to stay a Suit before the Commissioners Ecclesiastical, for that Articles were there exhibited against him, because he being a Divine, and having a Rectory with cure of Souls, and never brought up in the science of the Civil or Cannon Laws, and not having any intelligence in them, took upon him the office of the Chancelor of the Bishop of Gloucester, whereas there were divers canons and Ecclesiastical constitutions, and also directions from the late King James, and from the King that now is, That none should be admitted to have those offices of Chancelorship to a Bishop, unless he were instructed and learned in the Cannon and Civil Laws, because divers Causes tryable in the said Courts, are of weight, and the Judges there ought to have knowledge of the Laws, otherwise they cannot administer right to the Kings Subjects. Upon these Articles, Mr. Sutton being examined, confessed that he was a Divine, and had a spiritual living, and that the office of the Chancelorship of the Bishop is grantible for life, and that such a Bishop of Gloucester had granted to him the office for his life, which the Dean and Chapter had confirmed, whereby he had a freehold therein, and ought to enjoy it during his life; and that notwithstanding this answer they intended to proceed against him, wherefore he prayed to have a Prohibition, but the Court denyed it; for if he be a person unskilful in those Laws, and by Law ought not to enjoy it, they may peradventure examine that; for although a Lay-person, by his admission and institution to a Benefice, hath a freehold, yet he may be sued in the spiritual Court, and deprived for that cause; but if he hath wrong, he may peradventure by Assise try it; therefore a Prohibition was denyed.

Memorandum, That in this Term Sir *Nicholas Hide* of the middle-Temple was made the Kings Serjeant, and by special commission directed to Sir *James Ley* Lord Treasurer of England (because the Lord Keeper was sick) being made by Writ Chief-Justice of the Kings-Bench, he was there sworn in the place of Sir *Randolph Crew*, who was the last Term discharged of his place.

Termino Paschæ, anno tertio *Caroli* Regis,
in Communi Banco.



THE first day of this Term two new Serjeants were made, viz. Sir *Robert Berkley* of the middle-Temple, and *Rowley Ward* of the same House; they had their Writs in the Vacation, returnable *Quindena Pascha*, and appeared in Chancery the first day of this Term, and upon the Thursday sevenight following, all the Justices and Barons being assembled at *Serjeants-Inne* in *Fleetstreet*, The new Serjeants came in their party-coloured Robes, with the Marshall and Warden of the Fleet before them, and so presented themselves before the Justices, and because it was against course (for they ought to have come in their Robes of brown-blue, *alias* black-coloured) they were sent back again; also they came in the said Hall, each of them having his Servant, bearing his scarlet Hood, his Quoife, and Cap before him; but that also being against course, (for every Servant ought immediately follow, and not precede his Serjeant) they were directed to go back again, and return in their Gowns of brown-blue, and then (without any speech made unto them by the chief Justice, as the usuall manner is) they recited their Counts, and had their Writs read; they directed their speech to the chief Justice of the Common Bench, and then went and kneeled down before the two chief Justices, who putting on their Quoifes and scarlet Hoods, they then returned to their Chambers, and from thence went in their party coloured Robes unto *Westminster*, and were each of them presented at the Common Bench by two ancient Serjeants, and gave Rings with this inscription, *Lege Deus & Rex*, and they made their feasts at *Serjeants-Inne* in *Fleetstreet*, at which the Lord Treasurer, the Earl of *Manchester*, President of the Council, and all the Justices, Barons, Serjeants, the Kings Council, and Prothonotaries were present, and none others; and the said Sir *Robert Berkley* was the same Term sworn the Kings Serjeant at Law.

The Lord Morley and the Bishop of Chicesters Case
in the Star-chamber.

IN this Term all the Justices were assembled at *Serjeants-Inne*, upon a Case referred out of the Star-chamber, betwixt the Lord
Morley

Morley and the Bishop of Chichester which was. The Lord Morley and Sir Richard Molinex exhibited a bill in the Star-chamber, in Michalm. Term anno 19. Jacobi Regis, against the Bishop of Chichester and James Hutchingson, which was scandalous and a Libell against the Bishop: In anno 21. Jacobi came the general Pardon, wherein all offences (not treason) were pardoned; afterwards in anno 22. Jacobi there was a motion in the said Court for the Bishop, that the bill against him being scandalous might be taken off the file, whereupon it was ordered accordingly, unless cause were shewn before such a day; when no cause being shewn, it was ordered to be taken off the file, and the Plaintiff to be fined 100 l. to the King, and 100 l. damages were given to the Bishop. And now the Plaintiff prayed to have benefit of the Pardon, and to be discharged of costs to the Party, and thereupon cited the case betwixt Beverly and Poyer in primo Jacobi Reg. where, upon such bill, fine being given to the King against the one Defendant, and the other dismissed, and fine against the Plaintiff, and damages of 500. marks assessed to the Defendant against the Plaintiff, because the Bill was scandalous and a Libell as against him; although the Bill was before the general Pardon, and the Sentence after, yet it was resolved by advise of all the Justices, That the Pardon shall relate and discharge the Plaintiffs offence, and that the Sentence against him, for the fine and costs was taken away, because it was not a Bill depending, *quoad* the said Defendant against the Plaintiff, but *quoad* the other Defendant, the Sentence was good being for an offence, whereof the Bill is depending, which is excepted within the Pardon; therefore the fine was well assessed as to him, but *quoad* the fine against the Plaintiff, the Pardon takes hold and remitteth it: So here it was resolved, That the fine and costs are discharged by reason of the Pardon, and that there is not any difference betwixt this and *Beverlyes Case*, although that day was here given to shew cause, for he hath not any means to plead the Pardon; wherefore they all resolved, that this general Pardon intervening betwixt the Bill and the Sentence for the Fine and Costs, the Plaintiff ought to be discharged of the said Fine and Costs, by reason thereof.

Langham *versus* le Feme de John Bewett.

3. **U**Pon an Habeas Corpus to London, to remove the body cum caula of the Wife of Bewett, it was returned, That an Action of debt was brought against her, and her Husband in London, as a *feme sole Marchant* for wares bought by the said Wife, wherein the Husband is only named for conformity, and by the custome, the Execution should be only against her: Upon this returned befoze the Lord Richardson, he took bayle de bene esse, because it was affirmed that the Feme merchandized only for her Husband in buying wines (her Husband being a Vintner) in which Case, it seemeth, she is out of the Custome, and so ought not to be charged; and it was moved to have the direction of the Court, what should be done, for

for the *Feme* continued in prison; and the Custome of London was read, That a *Feme sole Marchant* is where the *Feme* trades by her self in one Trade, with which her Husband doth not meddle, and buys and sells in that Trade; there the *Feme* shall be sued, and the Husband named only for conformity, and if Judgement be given against him, Execution shall be only against the *Feme*; and Richardson and Yelverton conceived, That she should be discharged; for when it appears by examination, That she used the Trade which her Husband used, she in Law is but Servant to her Husband, and the wares coming to his use, he by intendment is to be sued; and this Case is out of the Custome, for it seemeth this Custome intendeth only where the *Feme* useth one Trade, and the Husband another, and doth not meddle with his Wives Trade, nor the Wife with the Husbands, but when she deals in her Husbands Trade, and in none other, it shall be accompted her Husbands Trade, and then the Husband ought to be sued, and not the Wife; but Hatton, Harvie, and my self were of another opinion; for as much as the Writ had returned, That she was sued in London as a *Feme sole Marchant*, according to the Custome of London, and therefore this is such an Action and Cause, wherewith this Court ought not to meddle, nor take consuance, nor can give the party relief, although he hath good cause of Suit; for in London they are Judges of their own Customes, and by intendment will protect in their Courts there according to their Customes, and not otherwise; and therefore we ought not to take away their priviledges, nor remove the Action out of that Court, where we cannot give remedy in this; And it is a forain surmise, That it appears not in the return, the *Feme* used the same Trade her Husband used, also they conceived, although she used the same Trade that her Husband at any time used, as in this Case is pretended, yet because at that time of the contract, (as was affirmed) the Husband did not meddle with the trade, but she only used it; and the Husband was then in the Kings service, beyond Seas, as a Souldier; and although he now returned bare and needy, yet did he not meddle with the trade, (as was affirmed by oath;) and these contracts were made in his absence, (as was likewise testified by oath.) It is no reason to accept bable, where an Action cannot be grounded upon that contract in this Court. But to remand the cause, according to the Books of 1. Edw. 4. 6. 35. Hen. 6. 28. 9. Edw. 4. 35. 21. Hen. 7. 18. But afterwards it was agreed and compounded, and nothing done. Vid. Mich. 29. Hen. 6. Rot 344 betwixt Geppings and Harding. This Case pleaded, and issue taken, whether she were a *Feme sole Marchant* in Trespasse for goods taken by her delivery, and found for the Plaintiff, That she was not a *Feme sole Marchant*: So that every *Feme* which tradeth in London, is not a *sole Marchant*.

March *versus* Culpepper and Anne his Wife,
Hilary 2. Caroli Rot.

4.

A Slumpfit, whereas one Hugh Goddard was indebted to the Plaintiff in an hundred and seven pounds, for wares sold unto him by the Plaintiff, and dyed intestate; The said 107 l. being due, and not paid, and administration committed to the Wife of the Defendant, for which 107 l. the Plaintiff intended to sue the said Wife as Administrator, but the Husband of the said Anne, dum sola fuit, desiring to know the true debt which the said Hugh her former Husband, at the time of his death owed unto the Plaintiff, the 30. day of July anno primo Caroli Regis, required the Plaintiff, Quod quidem Willihelmus Whiteman, Egidius Diggs & Hugo Owen superviderent compotum, betwixt the Plaintiff and the Intestate of and concerning the said wares sold, &c. ut suam certitudinem cognosceret, whereto the Plaintiff assented, and then they finding super visum compoti, That the said Hugh, the Intestate, at the time of his death, was indebted to the Plaintiff in the said sum of 107 l. gave notice thereof to the Defendant Anne the same day, &c. and the said Anne knowing that the Intestate at the time of his death was indebted to the Plaintiff in the said sum; the said Anne, dum sola fuit, in consideration of the premises, ad tunc & ibidem, scilicet, the said thirtieth day of July anno primo Caroli Regis, promised the Plaintiff to pay unto him the said 107 l. in this manner (viz.) part thereof, before the end of Michaelmas Term then next ensuing, and the residue within reasonable time after, and alledged in fact, That the said Michaelmas Term began at Reading, and ended such a day, and that neither the said Anne, dum sola fuit, nor the Husband and Wife, during the Coverture, had paid the said 107 l. or any part thereof, whereupon the Defendant pleaded to issue, and it was found for the Plaintiff, and alledged in arrest of Judgement, That here is not any sufficient consideration shewn to ground the Action; for there is not any matter of profit or advantage to the Defendant, nor any matter of charge or trouble to the Plaintiff, and without one of them, there is not any consideration to charge the Defendant, and to make him lyable to pay it out of his own proper goods, for the promise of the Wife, dum sola fuit shall not tye him without valuable consideration: But the Lord Richardson, Hurton, Harvie, and Yelverton conceived, he did a thing at her request which he needed not, viz. shew his accompts to her three Friends, appointed by her, which is a trouble unto him, and more than he needed to have done. And it seemeth the consideration is sufficient, and the breach of promise made thereupon, just cause of suit, especially the promising to pay at two dayes, which implies that in the interim the Plaintiff should forbear his Suit, which being found by Verdict,

dict, is a good consideration ; And thereupon the Plaintiff had Judgement.

After the end of this Term, two other new Serjeants were made, 5.
viz. *Ayliff* of *Lincolns Inne* and *Robert Callice* of *Grays Inne* ;
their Writs were returnable, *tres septimanas Pasche*, and they appeared
in Chancery *quarto die post* the same return, and kept their Feasts at
Serjeants Inne in *Fleetsstreet*, and observed the same form in their pre-
sentation as was before, and gave Rings *quorum Inscriptio fuit Regis*
Oracula Leges.

The Soldiers Case.

Memorandum this Case by his Majesties command was pro- 6.
pounded to all the Judges, to be by them resolved ; Where-
as one had received press-money, to serve the King in his wars, was
enrolled, taken pay, and delivered amongst the other Soldiers to a
Conductor, to be brought to the Sea-side, and did afterward with-
draw himself, and run away without licence ; whether this depart-
ure be felony, &c. Upon conference and debate hereof, it was
conceived by *Hutton*, *Yelverton*, and my self, That it was not felo-
ny, either by the Statutes of 7. Hen. 7. cap. 1. or by 3. Hen. 8. cap. 1.
which are the sole material Statutes to this point, as it is resolved
Coke 6. Rep. in the Case of Soldiers, That those Statutes mention only
departure from their Captain, who is a special named person, and
of special note and place, and the Soldier who departs, ought to be
delivered unto him as his Captain, and he ought to be a Captain in
war ; and a Conductor is such a person only, who is hired to guide
them in the way, or part of the way to their Captain, and such Con-
ductors are new Officers ; for in ancient time Soldiers were taken
and pressed by the Captains themselves, therefore this not being a
departure from his Captain, is not felony. But it was resolved by
Hide and *Richardson* chief-Justices, *Walter* chief-Baron, *Doderidge*,
Harvie, *Jones*, and *Whitlock* Justices, and *Denham* and *Trewor* Ba-
rons of the Exchequer, That such departure without licence from
his Conductor, was felony ; for they held that a Conductor is a
Captain within the Intention and meaning of the Statutes of 7. Hen. 7.
& 3. Hen. 8. which Statutes although they be poenall, yet being
made for the publick Service, and good of the King and Realm, may
very well be taken liberally, according to the intent of the Makers ;
for a Captain is but a Conductor, a Leader, a Chieftain, and so is a
Conductor, for he is one to command and lead them the way they
be to go, and the Statute of 7. Hen. 7. doth not speak of Captains,
but of Lieutenants, which in common acceptation is somewhat more
than a Captain, and yet no doubt but a Captain is within the said
Statute,

Statute, and by the same reason, a Conductor who is somewhat less than a Captain, may be a Captain, within the Statute of 3. Hen. 8. which speaks of Captains and petty Captains, and a Conductor is a petty Captain; *Conductor, dicitur a conducendo*, which is to hire or press, or to guide, direct, or go along together in the way, and *Conductores Militum* are Pressers of Soldiers, therefore a Conductor is a Captain, within these Statutes, and a departure from him without licence is felony. Another point was moved how this felony, and before whom it should be tryed, because it is a new Law, which makes a new felony, and it appoints that it ought to be tryed before the Justices of peace at their Sessions, whereupon a doubt arose whether Justices of Assise, and Justices of Oyer and Terminer may by their Commission try it or not; and herein was not any resolution given, but the greater opinion was, That the Justices of Oyer and Terminer may try it by their Commission.

Termino Trinitatis, anno tertio *Caroli* Regis,
in Communi Banco.

Wilcocks versus Bradell.

Prohibition, by Wilcocks against Jane Bradell the Wife of John Bradell, Principal of St. Mary Hall in Oxford, and Christian the Daughter of the said John Bradell, to stay their Suits in the Vice-Chancellors Court of Oxford; For that whereas Jane Bradell had libelled against him in the Vice-Chancellors Court of Oxford, for calling her Bawd and old Bawd (which is termed the Action of Injury, and Christian, for these words scurvy Whore and Jade, and that he did strike her: For staying of these Suits, Sentence being given against him in both, Wilcocks prays to have several Prohibitions; And now the Agent for the University, moved for a consultation, and shewed the Charters of the Unibersity anno 14. Regis. Rich. 2. & anno 14. Reg. Hen. 8. whereby is granted unto them, That they may inquire of all Trespasses, Injuries, and of all Pleas and Quarrells, and of all other Crimes and matters (except Pleas of Franktenement) where a Scholar or their Servants or Ministers sunt una partium, & cognitionem, & correctionem inde habend. secundum eorum Statuta, vel consuetudines, vel secundum legem Regni nostri Angliæ ad voluntatem Cancellarii; Ita quod Justiciarii de Banco Regis five de Communi Banco, vel Justiciarii de Assis non se intromittant. Et si iudem Justiciarii inquirere, seu aliquo aliter cognoscere, seu intromittere perstrinxerint; tunc super certificationem, notificationem, seu significationem Cancellarii Universitatis, seu ejus Commissarii Inquisitionem, seu cognitionem hujusmodi supersedeant, nec partes ad respondendum coram eis ponant, sed pars illa coram Cancellario, seu Commissario suo solummodo castigatur & puniatur in forma prædicta; And that these Charters were confirmed by Act of Parliament anno 13. Reginae Elizab. (and so were recited verbatim in the Act) And because Wilcocks was a Scholar, and Master of Arts of the said University, it was prayed that the cause might be remanded; and it was much debated at the Barr and Bench, for that the Parties Plaintiffs were women, which were not any persons privileged there, and the Defendant who is the Scholar doth not desire that privilege, but would oppose it, and prayeth these Prohibitions; but the Court agreed, for as much as the Charters are, That the University shall have consueance of those Pleas, where

where una pars est Scholaris : and so the Plaintiffs being thereby inforted to sue there, therefore the Cause should be remanded.

Jeromes Case.

2. **M**emorandum this Term, because one Jerome an Attorney had prosecuted three several Actions of debt, every of them being above the sum of *forty pounds* and so finable to the King; and procured Judgements to be entred upon them, no original Writs being sued forth, he himself having received the charges for suing the Originals, as well for the Fine to the King, as for the said Writs (as he himself confessed upon his examination :) And because it was done voluntarily, in deceit of the King for his Fines, and against his Oath as Attorney, That he should not practise any deceit, it was ordered, That he should be put out of the Roll of Attornyes, and be cast over the Barr and committed to the Fleet, but no Fine was imposed upon him, *quia pauper, vide 20. Hen. 6. fol. 37.* where is the like Judgement; and it was forthwith put in execution accordingly, and a President was shewn, which was entred in the Roll *anno 30. Elizab.* That one *Osbaston* an Attorney, for falsifying and forging a Writ of *Capias*, was ordered to be put out of the Roll, and cast over the Barr, and fined five pounds, and sworn never to practise after as Attorney, and to be brought to the Kings Bench Barr and Exchequer, that knowledge might be taken off him, That he was not to practise any longer as Attorney in those Courts.

Turner *versus* Palmer.

3. **Q**uare impedit ad presentandum ad Ecclesiam de Watton, and before appearance of the Defendant, it was moved, That the Writ might be amended; For his title of presentation is to the Vicaridge of the said Church, and not to the Parsonage; and because it was in a Writ original and in point of substance, the Court much doubted whether it should be amended; for it is clear the Writ was mistaken, for the words ad presentandum ad Ecclesiam alwayes intend right of Advowson of the Parsonage, but when the title is to the Vicaridge only, there is a special Writ ad presentandum ad Vicariam. *Fischerb. Nat. Brev. fol. 32. & 15. Eliz. Dy. 323.* But because Gay the Attoyny gave a note to the Curstoz of the Chancery to draw a Writ ad presentandum ad Vicariam Ecclesie de Watton, and because it is a peremptory Action in a Quare impedit, the six Months being passed; the party being a Purchasor of the Advowson, and that misprision happening by the fault of the Clerk, who did not pursue his Masters direction, it was ordered that it should be amended, and the Curstoz being present in Court, was appointed to amend it.

Whitacres *versus* Hamkinson, Hillary, 2 Caroli Rot.

DEbt upon an obligation with condition to pay 100 l. The Defendant pleads, That one John Woodcock was bound with him joyntly and severally in the said Bond, and that the Plaintiff recovered against him, and had him in execution upon a Capias ad satisfaciendum, and that such a Sheriff libere & voluntarie permitted him to go at large, Et hoc, &c. It was hereupon demurred, and being moved without argument, adjudged for the Plaintiff; for an Execution against one is no Barr, but that he may sue the other; For execution without satisfaction is not any Barr; and although he escaped by the voluntary permission of the Sheriff, as is pleaded, so as the Plaintiff is entitled to an Action against the Sheriff, yet that shall not deprive him of his remedy against the other Obligor; but if he had pleaded, that the Sheriff suffered him to go at large by the licence or command of the Plaintiff, it had been a discharge and might have been pleaded in Barr. 4.

Thorowgood and Jaques *versus* Collins.

TRespass. Upon Demurrer the Case was, that one Dobson devised the Land in question to the two Plaintiffs, and to four other persons habend. to them, their heirs and Assignes in perpetuum, & quod eorum omnes haberent æqualem & consimilem partem, Anglice, part and part-like, and every of them to have as much as the other; and whether this were a Joynttenancy or Tenancy in common was the question; for the Defendant claimed by devise under one of the Devises, and without argument it was adjudged, That by reason of these words, part and part-like, and being devised to them, their heirs and Assignes, and being in a Will, it was a Tenancy in common, and not a Joynttenancy, and that the Defendant had good title; wherefore it was adjudged for the Defendant. 5.

Eve *versus* Wright, Hillary, 1 Car. Rot. 732.

REplevin. The Defendant made consuance as Bayliff to the Lord Peters, because the Lord Peters was seised in fee of the Manor of Writtle, and he and all those whole Estate, &c. have had within the said Manor a Læte of all the Reliants in Writtle semel in anno, viz. upon the Monday next after the Feast of Pentecost tenendum, and all Amercements in that Læte, for not coming, and that the Plaintiff was amerced, and for the said Amercement the distress was taken, and issue being joyned upon this prescription, the Jury at the Barr found this special Verdict, viz. That the Lord Peters, and all they whole Estates, &c. have had a Læte, 6.

Læt, &c. verbatim ut supra; But further they find, That the Warden and Scholars of New-Colledge in Oxford are seised in fee of the Manor of the Rectory of Writtle, called Romans-fee in Writtle; and that they and all those whose, &c. have had a view of Frank-pledge of all the Inhabitants and Resiants within the said Manor called Romans-fee, semel in anno, in Festo commemorationis Pauli tenendum, secundum antiquam consuetudinem ibidem, as to their Manor of Romans belonging; And that the Plaintiff was a Resiant within the said Manor; and if super totam materiam, &c. So the point intended was, Because the Plaintiff was a Resiant within the Læt of the Colledge, whether he may be said a Resiant within another Læt, and so chargeable to two Læts? and whether one may have a grand Læt of all the Inhabitants within a Vill, and another may have an inferiour Læt of some of the Inhabitants within the same Vill, so as they shall be subject to two Læts was the Question? But all the Court held, That so far as much as the Verdict hath found the Issue verbatim, to be precisely for the Abowant, as he pleaded. The finding of the other matter after, is not material, but idle, and Judgement to be given for the Abowant. So the matter in Law was never debated by the Justices, Vid. 13. Ed. 3. Leet 7. 21. Ed. 3. 3. 18. Hen. 6. 12. book of Entries 506. Mich. 18. Jacobi in the Kings Bench, betwixt Cook and Stubbs.

Chapman *versus* Chapman, in the Exchequer Chamber.
Trio. 2. Car. Rot. 483.

7. **E**RROR in the Exchequer Chamber of a Judgement in Debt in the Kings Bench, upon an Obligation of 200 l. conditioned, That if the Obligor should at all times well and truly pay, perform, and keep all and singular the Rents, Covenants, Grants, Articles, Payments and Agreements, which on his part are and ought to be performed, comprised in such an Indenture of Lease, &c. That then, &c. the Defendant pleaded generally performance of all Covenants, &c. The Plaintiff replies and shews a breach for not payment of the rent at such a time, but doth not shew any demand of that rent, and thereupon the Defendant demurred, and it was adjudged for the Plaintiff; and now the Defendant assigneth for Error, That for as much as the condition of the Bond is general, for the performance of all the Covenants, and not particularized for the payment of the rent, the rent is not payable without demand, and therefore the breach was not well assigned; and for that the Books of 14. Ed. 4. 4. & 22. Hen. 6. 52. were cited, but all the Justices and Barons held, That the Judgement is well given; for he pleading performance of the payments, covenants and agreements, it shall be intended he had really performed them, and so had paid all the rents; and when the Plaintiff replies, That he hath not paid such a rent, he needs not alledge a demand, for the Defendant may not say

say it was not demanded, for then it should be a departure from his Plea, wherefore they held the Replication was good, and yet the Obligation being general for performance of Covenants, doth not alter the nature of the rent, but that it ought to be demanded; and upon this reason a case was cited, which was Pasch. 40. Eliz. Rot. 106. betwixt Specot and Sheers in the Common Bench; and the Judgement was affirmed.

Rolte versus Sharp, in the Exchequer Chamber.

ERror in the Exchequer Chamber of a Judgement given in an Assumpsit in the Kings Bench, where the Plaintiff declared, That he at the request of A. S. made a Gown and Petticoat for the said A. S. which lay by him, because they were not paid for, That the Defendant in consideration the Plaintiff would deliver to the said A. S. the said Gown and Petticoat assumed and promised to the Plaintiff, That he would pay as much as the Gown and Petticoat were reasonably worth, alledging in fact, That he upon that promise delivered the said Gown and Petticoat to the said A. S. and that then it was reasonably worth fifteen pounds, and that he had requested the Defendant to pay it, and he had not paid it; the Defendant pleads non assumpsit, and found against him, and Judgement for the Plaintiff: And now Error assigned, That the declaration is insufficient, because it is alledged he promised to pay, and he doth not shew to whom he should pay it, so it is uncertain unto whom the payment should be made. Secondly, there is not any consideration for the Defendant to be charged, for he hath not any benefit by the delivery to A. S. Thirdly, he doth not alledge that he delivered them to A. S. to her own proper use, and then the delivery to her is not material. Fourthly, the promise to pay for them tantum quantum, &c. is insufficient, but all the Justices held that the declaration is good; for as to the first, That he promised to the Plaintiff to pay, although he doth not say to whom he should pay, it is good enough; for it shall be intended to the Plaintiff, and to pay to another is idle; for the Plaintiff made the Cloaths, and the promise was to him to pay, therefore it shall be intended to be paid unto him, as in 4. Ed. 4. Obligation solvendum to the Obligor, is idle, and shall be in Law a good Obligation to the Obligee. To the second, That the consideration is good, for the delivery of those Garments out of his hands at the Defendants request, is a good and valuable consideration. To the third, That the delivery to A. S. at his request, is a very good consideration. To the fourth, it is the usual way to lay down in certainty, viz. That he should pay for it tantum quantum meruit, &c. and then to averr what it is reasonably worth, which being the common course and alwayes allowed, Judgement was therefore affirmed.

Purcase *versus* Jegon in the Exchequer.

9. **D**Ebt upon an Obligation of 200 l. conditioned for the payment of 100 l. upon the one and thirtieth day of September following, The Defendant pleaded payment the said one and thirtieth day, according to the condition of the Bond and Issue thereupon, and found that he did not pay, and costs and damages assessed, and Judgement given for the Plaintiff, and Error brought in the Exchequer Chamber, and the Error assigned, because the Verdict being upon the payment on the one and thirtieth day of September, is an idle and void issue, and so a void Verdict, and then the Judgement being given upon the Verdict, is ill; but the Plea of the Defendant is ill, and Judgement ought to have been given upon that and not upon the Verdict, sed non allocatur, for there being no such day as the one and thirtieth day of September, and the Jury finding that the money was not paid upon that day, nor any time before, they find in effect it was never paid, which is a good Verdict, and Judgement well given thereupon; And therefore Judgement was affirmed.

Termino

Termino Michaelis, anno tertio *Caroli Regis*,
in Communi Banco.

Claphams Case.

NOte upon information to the Court, That an Habeas Corpus being awarded to the Court of Gilford in Surrey, to remove a cause there depending, they notwithstanding proceeded. Upon examination it appeared, That the Writ was delivered after the issue joyned in debt, viz. per minas pleaded, and That the issue was joyned more than six weeks after the Action brought, so as by the Statute of 21. Jacobi cap. 23. the Judge might refuse. It was resolved by all the Court, because it was in an Action of debt upon an Obligation of 200 l. not made within that Will, That the Statute doth not extend to this Case; For that provides against the removing by Habeas Corpus, such Actions only where the cause of Suit is properly arising within the Will. Secondly, for as much as the proceedings were before one who was Town-Clerk and Attorney of the Common-Bench, and not an utter Barrister (as he ought to be by an express proviso in the Statute, and such utter Barrister ought to be there present, and cannot have a Deputy, but such one as is an utter Barrister and present at the Tryal) It was resolved, That after the Habeas Corpus delivered the said proceedings were ill, and not warranted by the Statute, and their proceedings after an Habeas Corpus to Tryal and Judgement, were also void: Whereupon a Superseas was awarded; And the Judges of the Kings-Bench, being informed thereof, agreed, That their course in the Kings-Bench was to disallow proceedings in an inferiour Court, after an Habeas Corpus delivered, unless it were a cause arising in the Will or Corporation.

Oxford *versus* Rivett, Trin. 3. Car. Rot. 1684.

SCire facias against Katherine Rivett, Administratrix of John Rivett, upon a Judgement against the Defendant, as Administratrix, for a debt due by the Intestate. The Defendant pleaded, That the Intestate made his Will, and thereby constituted Edward Rivett his Son, within age, his Executor, and that Administration was committed unto her durante minore etate, and that he upon such a day attained the age of seventeen years, and then refused to be Executor, and the Administration was committed to Sir Hugh Wirrell, and that at the time that Edward Rivett came to

to the age of seventeen years, she had fully administered all the Estate which came unto her hands, &c. The Plaintiff replies, That at the time the said Edward came to his full age, devastavit diversa bona of the Intestates, unde satisfacisse potuit to him his due debt, the Defendant rejoyns quod ipsa non devastavit aliqua bonorum, &c. & de hoc ponit, &c. & prædictus querens similiter; and upon this it was tryed and found for the Defendant, and now alledged in arrest of Judgement, That here is not any issue joyned, and therefore a Bil-tryal not aided by any Statute; for in the replication he doth not alledge, That Katherine devastavit, but that devastavit; and Katherine is not named, but by a Parenthesis; but Richardson, Hutton and Harvie conceived it should be construed, That Katherine devastavit; for she was the Administratrix; and the other, by intendment, could not make the devastation. And the Replication is, That devastavit diversa bona, unde satisfacisse potuit the Plaintiff of his debt, which is a strong intendment that she devastavit, and it shall be a good intendment to aid it after Verdict. And she in the Rejoinder saith, Quod ipsa Katherine non devastavit; & de hoc ponit se super patriam, & querens similiter: And here upon a Verdict was given, which the Plaintiff shall not avoid by an exception, to his own Replication. But Yelverton and I held, That an intendment shall not make a Replication good, and an Issue cannot be joyned, but where there is a direct affirmative and negative; but here is no direct affirmative quod devastavit; And the Court shall not intend it to be Katherine, more than another; and it may be that Edward Rivet the Executor non devastavit: But, quacunque via data, the Court, by intendment, shall not aid it, where there is no issue joyned; and the Verdict cannot help it. Vide resid. postea. pag. 93.

Fawkeners *versus* Bellingham. Mich. 22. Jac. rot. 490. Suffex.

3. **R**Eplevin of the taking of three Oxen, upon the third day of September, anno vicesimo Jacobi Regis, apud East-Greensted, in a place called Horseshoe-Meadowe; The Defendant makes consuance, as Bayliff to Sir Henry Compton and John Blund, for that the place where, was ten Acres of Meadow, quodque diu ante tempus quo, &c. ultimus Presbyter celebrando divina in Ecclesia de East-Greensted was seised in fee of a Messuage called Boyles, and of one hundred Acres of Land, forty Acres of Meadow, and thirty Acres of Pasture in East-Greensted, aforesaid, whereof the place where, time whereof, &c. and of all the time, &c. was partell in jure presbyteratus sui, and held them of the Lord Windsor and John Sherry, as of their Manor of Brambleton in the County of Suffex, by fealty and rent of eighteen shillings and four broad arrows annually at Michaelmas, to be paid, and Suit of Court and Heriot. Of which Services the said Lord Windsor and John Sherry were seised, by the hands of the said last Presbyter,
- as

as by the hands of their *Veray-tenant*, and being thereof so seised, the said last *Presbyter* continued his possession, unrill the Statute primo Ed. 6. cap. 14. of Chanteries, and shews the Statute with the saving of all Rents, Suits, and Services, whereby the King was seised in fee of the Tenements unde, &c. and that the said King anno quarto Regni sui granted them to Thomas Reve and others, whose Estate one John Cornford now hath, and that the said Lord Windsor and John Sherry were seised in fee of the said Manor of Brambleton, before the said Statute and after; And that after the said Statute, viz. in anno quinto Reginae Eliz. they infeoffed one Pickering of the said Manor and Rent, and so by divers mean conveyances the same Manor came to the hands of the said Sir Henry Compton and John Blund, in anno 15. Jacobi, and for the rent of eighteen shillings for one year behind, at Michaelmas anno 20. Jacobi, he made consuance as Bayliff to them, as in land chargeable to their distress, for the said rent in forma predicta, and avers, That *Presbyteratus predictus* fuit in esse within five years before the Statute of primo Edw. sexti, and makes divers other averments, That the Lands were within the Statute, and that they were within the saving of the Statute. The Plaintiff in barr of the consuance pleads protestando, That the said Priest non reuivit and protestando to all the mean conveyances, pro placito dicit, That the said Sir Henry Compton and the said John Blund, nec aliquis alius, whose Estate they have in the said Manor, were seised of the said rent within forty years ante tempus quo, &c. and thereupon it was demurred, and this Case was oftentimes argued at the Barr and Bench: The sole question was, whether this rent be within the Statute of 32. Hen. 8. of limitations; for if it be, then no seisin being had within forty years (as is confessed by the Demurrer) he is to be barred of that consuance; and it was argued by Yelverton, Hutton, and Richardson for the Defendant, That although it be a rent within the words of the Statute, yet it is out of the intent of the Statute; for the Statute extends only to rents services, and rents by prescription, but rents which begun by deed within time of memory, or were created quasi by an Act of Parliament (and so their beginning known) are out of the intent of the Statute; for that intended only such rents, whereof seisin ought to be alledged in an avowry, and being alledged shall bind the party, unless there be a travers; and when seisin is alledged, it is but formal, and not the substance, as it is where an Avowry is made of a Rent created by Deed, or reserved by Grant within time of memory; although seisin be there alledged, yet it is not traversable, but the Deed only which is the Title, as it is held Coke 8. Rep. fol. 64. Sir William Fosters case, and 10. Rep. fol. 108. Lofeilds case. So rent created or made by Act of Parliament, the beginning thereof being by the Act, that is his Title, and the seisin is not material; and although the said rent were a rent-service, yet by the construction of the Act of primo Edw. sexti, it is

turned into a Rent-seck, and the beginning of that turning being known, it is therefore as a Rent created by Parliament, and Yelverton and Hutton called it a Rent coming out of the womb of the Parliament, and therefore no time to have seisin thereof within forty years, for the Statute preserves it unto him; and as he hath loss thereby as Lord, That he cannot have Escheats and other profits which a Lord hath, so hath he benefit, that *lashes* of time or seisin, although an hundred or two hundred years shall not prejudice him, and therefore compared it to the Case of a Rent-charge by Dred, or a Rent granted upon equality of partition, in an Abowry for them; although seisin be alledged, yet it is not material nor traversable, nor is it of necessity to alledge it; And this Statute of primo Ed. 6. taking away the Signiory, the Rent which is the fruit ought to be construed as liberally and beneficially as may be, and this Abowry is grounded upon the Statute of primo Edward. sexti, which he shews in his Abowry, and therefore is out of the Statute of Limitations, which extend to Abowries at the common Law: But they agreed, That it is the same Rent in estate as it was before (*viz*) if it were an Estate for life the remainder over, so it shall be now; and if it were descendable on the part of the Dower, so it shall now descend in the same manner: But it is altered in quality, for it is turned into a Rent-seck, and the beginning thereof being known, is therefore out of the Statute, *id est*, out of the intent of the Statute, although not out of the words, and compared it to the Case where confirmation is within time of memory, to hold by ten shillings rent whereas before he held by twenty shillings rent: Although there were not any seisin of this rent within forty years, yet it is out of the Statute; as if Judgement be in a *per quæ servitia*, such Rent is out of the Statute, because there is a Record thereof; so for as much as this Rent is turned into a Rent-seck by the Parliament, it is out of the Statute; But it was argued by Harvie and my self to the contrary, That this is within the Statute, for the Statute extends to all Rents, Suits and Services, so it is within the words, and we also conceived it to be within the intent; for although it be a new Rent-seck, and was before a Rent-service, and the time of the alteration thereof is known, yet because the beginning of the creation of this Rent is unknown, and it is the same Rent it was before (for it is partell of the Manor as before) as 31. Assis. fol. 23. which proves that it is an ancient Rent, time whereof memory, &c. And also the seisin before it was turned into a Rent-seck, is sufficient to have an Assise, as Coke Rep. 4. fol. 9. Bevills Case; and therefore the Rent being an ancient Rent is distrainable of common right, and that this is not a new Rent made or created by the Statute of primo Edw. sexti appears by this, because the Statutes saves only all ancient Rents, &c. and by construction of Law this shall be taken to be and saved to the Lord as a Rent-seck, because the King cannot be a Tenant nor hold of any, as the Tenant before did, *Vid.*

14. Eliz. Dyer 313. Coke 1. Rep. fol. 47. and this Rent is not as a Rent given by the Statute, for a saving in an Act of Parliament is no giving of any new thing, unless in some special case, being a saving of that which was in esse before, and it is quasi an Exception or Foreprise out of the Statute, as it is held in Plow. Comm. 563. 35. Hen. 6. 34. 26. Assises fol. 66. 8. Ed. 3. 67. 9. Ed. 3. 27. Hen. 8. Title Parliaments 77. So this saving being general doth not give this rent, but is a saving of it out of the Statute, where otherwise it would have been extinguished and lost; For every one is intended to give all their rights in such lands or rents issuing out of the same, but only such as are saved thereby: So the Statute doth not give nor make any new thing by the saving, but saves that which before was in being, and so it is the same rent: And this is proved by the averment, That he had such rent before: So it is not to be compared to a rent made or created by a Dæd or Record, within time of memory; for this is a rent, whereof the beginning is not known, and therefore of necessity seisin must be alledged thereof in an Avowry; And this seisin is always traversable, for in an Avowry the seisin is the principal matter which ought to be alledged, and it shall be traversed, as it is held in 22. Hen. 6. Cok. 9. Rep. fol. 34. Bucknalls Case. 27. Hen. 8. fol. 4. & 20. 34. Hen. 8. averment 113. and seisin alledged ought to be confessed and avoided, as by coercion of distress, or traversed, and a traverser shall never be of a seisin generally, but ever of a seisin within time of limitation, as the Books be Dy. 107. 315. Cok. 8 Rep. fol. 64. Warrens case cited in Fosters case 10. Hen. 6. 6. Keilw. 13. Hen. 7. fol. 31. 21. Hen. 7. 71. Dyer 330. And whereas it was affirmed, That seisin should not be alledged or traversed, because the Rent is changed within time of memory; that cannot be a reason, for then when the Lord purchaseth the Tenancy or Mesnalty, he shall have a surplussage of the Services, which are notwithstanding distrainable of common right, as the Book 2. Ed. 3. Extinguishment 1. 20. Ed. 3. Avowry 126. and therefore it is against Law, That the Lord should be bound in that case, to any time of seisin; And this Statute of Limitations is favourably to be expounded, to repel the mischiefs, and not to be enlarged in time further than the Statute appoints, as Plowd. Comm. fol. 371. per Catim in cases of Fines, which is the reason there given, That Copyholds are within that Statute, and it being within the mischief and remedy intended by the Statute, ought to be construed according to the Rules in Coke 3. Rep. fol. 7. Heydons case, wherefore they concluded for the Plaintiff; But by reason of the opinion of the other three Justices, Judgement was given for the Defendant: But afterwards a Writ of Error being brought in the Kings Bench upon the point in Law, the Judgement was reversed quod vide postea. pag. 214.

4. **M**emorandum, In the last Vacation, one, Servant to Serjeant Headly usually attending on him, was arrested upon a Process out of the Court of the Marshalsey, and thereupon obtained a Writ of privilege out of this Court, reciting, That Serjeants at the Law which are attending this Court, and their Servants ordinarily waiting upon them, ought to enjoy the privilege, to be sued in this Court; which being delivered to the Steward of the said Court, he would not allow thereof, supposing Serjeants at Law ought not to have such privilege, for them and their Servants, and that he might not be sued by bill filed against him, as 11. Hen. 6. 8. Dy. 24. Book of Entries 430, 431. And now this matter was moved to this Court, That they ought to have the privilege, for they are properly attendant at this Barr, and none others are admitted to practise here; and although peradventure it may be doubted, whether he may be sued by bill filed, because there cannot be a *fore-fudger* against him, yet he may be sued here by original: and presidents were shewn, one where Martyn Serjeant was arrested in London, at the Suit of the Bishop of Winchester, and at the Suit of others, and had a Writ of Privilege reciting, That Serjeants at the Law were to be attendant to the said Court, ex officio plus quam alibi, and that their service was necessary at this Barr, and therefore commanded them to surcease, and to prosecute their Suits in the Common-Bench; whereupon it was allowed, and the party discharged, of the Suit in the Court of Marshalsey. A Copy of the Record and Writ produced, was as followeth.

Rex Majori & Vicecomitibus London, &c. cum omnes & singuli de Curia nostra de Banco, in veniendo versus Curiam nostram, ibidem morando & exinde versus propria rediundo sub protectione nostra esse debeant, & à totis temporibus retroactis consueverunt, Juri convenit ipsis, & quibus in eadem Curia, Nos de nostris Ligis, conservare dignemur exhiberetur pro eisdem nostrum privilegium specialius protegi quietius defendere. Nulli liceat Judici seculari placita versus eos mora, nisi in feloniarum Appellorum, vel liberi tenementi causis alibi, quam in Banco prædicto cognoscere vel tenere; Quidam tamen *Henricus* Episcopus *Wintonie*, & *Johannes Podridg* Curie nostræ prædictæ privilegia, nescientes, nec ingendo, nec indigendo Ministerium *Johannis M.* servientis ad legem: Qui ex officio incumbit in Curia illa potius quam in alia ministrare, præsertim cum eadem Curia ulterius gradus personarum, quam servientes ad legem non permittit, diversas debitorum querelas (viz.) prædictus Episcopus unam super demandum 100 l. & prædictus *Johannes Podridg* alteram super demandum de 12 l. versus ipsum *Johannem M.* &c. coram vobis Prefatis Majori tenendas affirmarent, & per certa bona sua per Ministros vestros attachiari, contra prædictæ Curie nostræ privilegium, minus debite procurarent. Vosque prefatus Major querelas prædictas coram vobis in Curia vestra circiter prædictas summas persistitis terminand, prout ex ipsius *J. M.* querela accipimus, unde nobis

bis supplicavit sibi per nos de remedio provideri; Et quia eidem *J. M.* fieri, quod est justum, & libertati & privilegio Curiae nostrae praedictae inviolabiliter observari volumus, vobis praecipimus, quod vos praefatus Major si querelas praedictas, vel earundem alteram sumpseritis, alioquin vos praefati Vicecomites de placitis supersedeatis, querela vel earundem alteram coram vobis, & quemlibet vestrum de placitis illis, & aliis quibuscunque versus praefatum *J. M.* quocunque nomine censeatur, coram vobis sedente Curia nostra de Banco praedicto, moris, vel movandis supersedeatis omnino. Test. &c. *Note this Writ well, That Serjeants only, shall attend at the Common-Bench, and shall be impleaded there, and not elsewhere.*

Memorandum, That *George Vernon* a Reader of the *Inner-Temple*, received in the time of the last long Vacation a Writ to be Serjeant, returnable *Mense Michaelis*, and thereupon he appeared upon the last day of October, which was the *quarto die post*, in Chancery, yet the Prothonotary said, That he might have appeared there the first day, or any day before the fourth day; and being sworn in Chancery; he had afterward day given him to appear in the Common-Bench, untill the eighth of November, at which day he came in the Morning to *Serjeants-Inne* in *Fleetsstreet*, accompanied with the Benchers, and others of the Society of the *Inner-Temple*; and there, before the Justices of the same House, and the Lord *Richardson* chief-Justice of the Common-pleas, the other Justices of *Serjeants-Inne* in *Chancery Lane*, not being present, he went in attended with the Warden of the Fleet and the Usher of the Exchequer, and there without any speech made (as the usual course is by chief-Justice) he recited his *Count*, and after demand of the *Oyer* of the Writ by one of the Serjeants, and the Writ read by the chief Prothonotary, and defence made by another Serjeant, he kneeled, and his Coyse and Hood were put on, and he dismissed, and afterwards the same day went to the Common-Bench, and was there presented by two of the Kings ancient Serjeants, and then recited his *Count*, and Defence was made, and the Writ read, and he placed in his place of puisny Serjeant. Mr. *George Wild* one of the utter Baristers of the *Inner-Temple*, delivered Rings for him with this Inscription, *Rex legis Regnique Patronus*, and afterwards, upon the seventeenth day of November the same Term, he was made one of the Barons of the Exchequer.

Dr. Brownlow chief Prothonotary, shewed unto me these presidents Mich. sexto Jacobi Regis rot. 1001. *Lovelace versus Cockett*.

Debt upon a Bond. The Defendant pleaded acceptance of another Bond in discharge of the Obligation aforesaid, and ruled by the Court to be ill; and Mich. 2. Jacobi rot. 3272. Debt
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by Branchawte against Cornwallis : He pleaded acceptance of a Statute-staple after the day of payment, and no Plea. And Trin. 41. Eliz. rot. 1409. Maynard versus Crick. Debt upon a Bond. The Defendant pleaded acceptance of another Bond in satisfaction of the first Obligation, and it was ruled by the Court to be no good Plea. And Trin. 14. Jac. rot. 734. Oliver versus Lease. Debt upon a single Bill. The Defendant pleaded, That he infeofed the Plaintiff of such land in discharge of the said Bill, which he accepted, and it was held to be an ill Plea, Vid. 4. Hen. 8. Dyer 1. 12. H. 4. 23.

Young *versus* Young.

7. **F**ormdon in descender. After Judgement upon a Verdict, the Record being removed by a Writ of Error, it was moved to have it amended in the Philizers Roll, viz. whereas the Defendant was admitted before Justice Jones, Pasch. 22. Jacobi, being then Justice of the Common-Bench, to prosecute in omnibus Actionibus, and this was entred in the Plea Roll, and viewing the Roll, it was quod concessum est per Curiam, That the Defendant by such a one, his Gardian should prosecute, &c. and so it is entred in the Remembrance. And the Philizers Roll is, That John Young by J. S. his Gardian ad hoc admissus per Curiam obrulit se quarto die, &c. But there was no entry in the Philizers Roll (as is usually in such cases) quod concessum est per Curiam, quod petens sequatur per J. S. his Gardian ; whether this may be amended and inserted, was the question, and all the Court held it might well be amended, notwithstanding the Writ of Error brought and the Record removed ; because it appears by the note under Justice Jones hand, That he admitted the Gardian ad prosequendum, and by the several entries it appears, That he sued by his Gardian, and the entry in the Roll in the Philizers Office, is quod obrulit se ; so the admittance of the Gardian appearing to be before the Obrulit, it is the omission of the Clerk, or rather the Act of the Court, which did not cause it to be entred in the Philizers Roll ; it ought not therefore to prejudice the party, no more than the not entring of a Warrant of Attozny, when it appears he hath a sufficient Warrant of Attozny, which hath oftentimes been used to be entred upon examination of the truth, although a Writ of Error be then brought ; wherefore by the rule of the Court it was ordered to be amended, but some doubt was made, whether admittance to sue by Gardian, where it ought to be by *prochein amie* be good, as it is in Fitz. Nat. brev. 27. but the Court delivered no opinion therein, because there were many presidents, that such entries had been both waives.

Kirtons Case, in the Court of Wards.

8.
NOte. Upon an Assembly of all the Justices and Barons in Serjeants- Inne in Fleetstreet, The Case was propounded before them by Hide chief-Justice, which had been argued before the two chief-Justices and chief-Baron, being the Case of one Kirton referred unto them out of the Court of Wards. A man mortgageth upon condition, That if he or his Heirs repay 100 l. at such a day, he shall re-enter: He dies leaving issue a Daughter only, his Wife being *privement enseint* with a Son, the Daughter and Heir at the day payes the 100 l. and afterwards the Son is born; Whether the Son shall enter upon the Sister, or if she shall retain it forever, was the question? vid. Coke 1. Rep. fol. 99. Shelleys Case, That the Daughter which paid the money shall retain it; for *qui sentit onus sentire debet & commodum*, and 9. H. 7. 21. by Wood, That if the Daughter enter for a condition broken, and afterwards a Son is born, the Son shall not take advantage; &c. because he hath not any right at the time of his entry; and it was held by Hide chief-Justice, Walter chief-Baron, Denham, Hutton, Whirlock, Harvie, Yelverton, and my self, That The Sister shall retain it against the Son born, after performante of the condition; For in as much as she paid the money (and if she had not paid it, the land had been lost) if she could not retain the land against the Son, she hath no remedy for the money, and by payment thereof she hath gained the land, and is in, as a Purchaser, although she were intituled thereto by the condition, and as Heir, and she shall retain it as she shall the *Perquisite* of a Villain, and as land gained by her vigilancy; for otherwise it should be lost to both, and she should lose both land and money; therefore the Law wills, That she shall retain the land. But Richardson chief-Justice of the Common-Bench, and Dodderidge held strongly the contrary, because she hath it as Heir, and then the nearer Heir being born shall defeat it; And it was in her a voluntary act to pay the money, which she might well have omitted, and she paid it of her own head, and at her own perill; Jones and Trevor puisny Barons doubted thereof, and would not deliver any opinion, but rather inclined that the Son should have it.

Halleys Case.

9.
EJecione firma, upon a Lease of a *Belluaght* in Oxon. The Defendant being Principal of Gloucester-Hall in Oxford, pretended, That he being a Scholar in Oxford, and a privileged person, ought to be sued before the Vice-Chancellor in Oxford according to their course of proceedings there, *secundum morem Universitatis*, and according to the Charters granted to the Universities in anno 3. Rich. 2. & anno 14. Hen. 8. and confirmed by Parliament

ment anno 13. Eliz. Regin. wherefore he prayed there might be a stay of the proceedings in this Court, and shewes their Charters, That they had consuſance of all Suits, Contracts, Covenants, Quarrels, (except concerning freehold) and this being a personal Action, they ought to have consuſance thereof; and Dampson for the University shewed an ancient Record in this Court, in anno 22 Edwardi primi, where a Plea of Covenant was brought in the Court of the Vice-Chancellor of the University of Oxford, by reason of a contract made before that time, wherein was granted unto them, That they should have consuſance of all Actions personal and Contracts; and this Covenant in question was, That he should enjoy such an house in Oxford for a year; and because this Court of the Common-Bench had granted a Prohibition to stay the proceedings in the said Suit, being begun in the Court-Christian, before the Vice-Chancellor; The Record mentioned, that upon the shewing of this Charter, it appearing, the Action was brought only upon the Contract, and not pro Domibus, therefore a consultation was granted; and so it was prayed here, because this Action was but personal, That they might have consuſance thereof; but all the Court denyed it, and affirmed that the Vice-Chancellor had not any Jurisdiction, nor might hold Plea thereof; For in this Action he shall recover possession, and shall have an Habere facias possessionem, and thereby he that hath a Freehold may be put out of possession: and it is not like to the Record shewn; for there it is only an Action of Covenant, wherein the Plaintiff shall recover damages only, and therefore reason to grant a Procedendo there; but here he shall recover possession, and therefore by their own rules they ought not to hold consuſance, nor have liberty to proceed in this Case. Note that by this ancient Record, it appears what are the privileges of the said University, and the Jurisdiction of this Court to grant a Prohibition where they proceed in Court-Christian, in prejudice of the common-Law, without resorting to the Chancery.

Whytmore *versus* Porter.

10. **S**IR William Whitmore and others, Executors of the Lady Craven, against Elizabeth Porter Executrix. In the Exchequer upon a special Verdict, the Case was; The Defendant as *Executrix de son tort demesne* takes divers goods into her hands, to the value of 400 l. and sells them by the assent and direction of John Porter her Son, who afterwards takes letters of administration, and paid the just debts upon specialties, as far as the goods of the Intestate amounted unto, as well to the value of the said 400 l. sold by his Mother, as of all the goods whereof the Intestate dyed possessed; and after that an Action of debt was brought against the Feme, as *Executrix de son tort demesne*, who pleaded *pleinment administravit*; and upon evidence all this matter was disclosed, and whether she shall be chargeable or not, was the question?

question, and adjudged by all the Barons, who delibered their opinions seriatim, That she shall not be charged, but that the Plaintiff shall be barred ; For this Action being brought after the administration committed, and when she was chargeable for those goods to the Administrator, and when the Administrator had fully satisfied in paying the debts of the Intestate, as far as all the goods of the Intestate amounted unto. It is not reason she should be charged against the Plaintiff, for then she should be double charged, viz. to the Administrator, and also to the Creditors ; also it is not reason that more should be satisfied out of the goods of the Intestate unto the Creditors, than the goods of the Intestate amounted unto, and so much being satisfied by the Administrator, they should not have more ; But if the Action had been brought against her before the Administrator had fully administered all in debts, peradventure it might have been otherwise ; For she having gained goods into her hands, is chargeable for them, as *Executrix de son tort demesne*, untill she gives satisfaction for them to the true Administrator, or she her self satisfy for the true debt to the value ; Whereupon it was adjudged for the Defendant.

Kynaston *versus* Moore, Hill. 2. Car. rot. 850.

ERror in the Exchequer Chamber of a Judgement in the Kings Bench in Action *Sur Trover* and *Conversion* of divers goods, & inter alia of 190 l. in pecuniis numeratis. Upon not guilty pleaded and Verdict found for the Plaintiff, and entire damages given, Error was assigned, because *Trover* and *Conversion* cannot be of money out of a bag ; But all the Justices and Barons agreed, That it well lies ; For although it was alledged, That money lost cannot be known ; and so whether it was the Plaintiffs money, whereof the *Trover* and *Conversion* was, as is the charge of this Action, yet the Court said, it being found by a Jury that he converted the Plaintiffs money (for the losing is but a surmise and not material, for the Defendant may take it in the presence of the Plaintiff, or any other, who may give sufficient evidence, and although he take it as a Trespasser, yet the other may charge him in an Action upon the Case in a *Trover*, if he will) The Plaintiff had good cause of Action ; Wherefore the Judgement before well given was now affirmed, and the Justices and Barons said, That this Action lies as well of money out of a bag, as of corn which cannot be known.

11.

Young *versus* Pridd, Hillary 2. Caroli, rot. 778.
in the Chequer Chamber.

TRespass by the Husband alone. For that the Defendant the fourth day of October anno 22. Jacobi Reg. assaulted verberavit & male tractavit the Wife of the Plaintiff, and carryed her away with such his goods, and

12.

detained her for half a year per quod solamen & consortium quae habere potuisset with his said Wife he lost, & alia enormia ei intulit ad damnum, &c. Upon not guilty pleaded, and found for the Plaintiff, and Judgement, Error was brought in the Exchequer Chamber, and assigned, That the Husband hath brought this Action for the battery of his Wife, which he cannot do without his Wife, and hath recovered damages, for this Battery, and therefore the Judgement erroneous; but all the Justices and Barons held, That the Husband in this Action did not recover damages for the Battery of his Wife, but for the loss which he had in wanting her company, and the per quod consortium amisit, and abduction of her is one entire conjoyned Act, and for that cause the damages were given, and for the Battery, true it is, That the Wife ought to have joyned to recover damages, and this Verdict and Judgement do not barr the Wife, to have an Action after the death of her Husband for the Battery, or she may joyn with her Husband in another Action; and a precedent was shewn, Pasch. anno 17. Jacob. Reg. rot. 167. or 157. betwixt Hyde and Scissor, where such an Action was brought verbatim, as this Action is in the Kings Bench, and recovered, and afterwards Writ of Error was brought, and the Judgement affirmed, and so all the Justices and Barons here held; Whereupon this Judgement was also affirmed.

More *versus* Hodges, in the Exchequer Chamber.

13.

Error of a Judgement in the Kings Bench in Assumpsit after Verdict and Judgement, the Assumpsit being for the payment of a thousand pounds for a marriage Portion, and Verdict for the Plaintiff upon non assumpsit pleaded, and Judgement accordingly; the Error assigned was, That the Issue was joyned, Trinity anno secundo Caroli Reg. and the Venire facias bears date quarto die Maii, anno secundo Car. Reg. which was before the Issue joyned, so the Tryal thereupon was ill; and by a Writ of Cerciorare upon Discontinuation alledged, to certifie the Writ of Venire facias and Distringas, whereupon the Tryal was had, they being certified, the Writ was of the date of quarto Maii, which was in Easter Term, sed non allocatur; for the Tryal upon the Distringas, and the Roll of awarding the Venire facias being good enough, the misdating of the Venire facias (which is a judicial process) is no cause to stop the Judgement, for it is but a mis-suing of the Process at the most, and aided by the Statute of Jeofailes; and the Court intends that there was another Venire facias according to the Roll, and subsequent to the Issue, and so mentions the Roll, and the Distringas upon which Writ the Tryal is by Nisi prius made long after the Issue, and therefore the Tryal is good, and shall be intended, That there was another Venire facias warranted by the Roll, and now wanting, and that this Venire facias now certified, is not the Venire facias, whereupon the Tryal was had; wherefore
not with-

standing the error assigned, it was held by all the Iustices and Barons, That the Cryal was good, and aided by the Statute of Jeofayles. The second Error assigned was, Because upon the Venire facias is returned summonitus est, where it ought to have been Attachatus est. Sed non allocatur, because it was but matter of form, which shall not be prejudicial after Verdict: Whereupon the Judgement was affirmed.

Howell John *versus* Thomas. Trin. 1. Car. Rot. 158.
in the Exchequer Chamber.

ERror, in the Exchequer Chamber, of a Judgement in the Kings Bench, in an Ejectione firmæ. The Error was assigned, because in the Bill the Plaintiff declares, upon a Lease for three years, but in the Plea-Roll, whereupon the issue is joyned, and in the Record of Nisi prius, it is upon a Lease for five years; so the Bill and Declaration varies, and diminution was alledged by the Plaintiff; and by Certiorare the Bill was certified, That it was only for three years; And hereupon Error being assigned, the Defendant, in the Writ of Error, when the Plaintiff alledged diminution of the Roll, had thereupon another Writ of Certiorare, whereby the Bill was certified, wherein he declared upon a Lease for five years: So it well warrants the Declaration upon the Roll, and the Nisi prius; And which of these certificates should be allowed was the question? And it was held by all the Iustices and Barons, That the second Certificate upon the diminution, alledged by the Defendant in the Writ of Error, should be received; for the Bill certified upon it, is intended the true Bill, for it warrants well the declaration upon the Roll, and the Record of Nisi prius; and the other shall be intended a fictitious Bill, and not the true one, and the allegation of diminution by the Plaintiff in the Writ of Error, and procuring a Certificate, shall not stop the Defendant, without assigning of Errors to alledge a diminution, and from procuring the true Bill to be certified: So it is where the Plaintiff in a Writ of Error alledgeth diminution, and procures an original to be certified, which doth not warrant the Judgement. If in truth there be another Writ-original, which well warrants the declaration, the Defendant in the Writ of Error, for affirmance of the Judgement, may well alledge diminution, and have a Certiorare to procure the true original Writ to be certified: Whereupon the Judgement was here affirmed.

Wolfe *versus* Hole.

Wolfe Attoyny of the Common-Bench brings an Attachment of priviledge against Hole, and declares in an Action of the Case upon an Assumpsit, and after Verdict for the Plaintiff, and Judgement, Error was brought and assigned, because there

were no pledges entred upon the imparlance-Roll; and now Henden moved, That this might be amended, and pledges inserted; for in the Nisi prius Roll there the pledges are mentioned, which is sufficient to induce the Court, and he said it was but matter of form, and aided by the Statute of decimo octavo Elizab. Reg. cap. 13. after Verdict, but the Court denyed the amendment: for although the Issue-Roll shall be amended by the Imparlance-Roll, because it is precedent, yet the Imparlance-Roll shall not be amended by the Issue-Roll, being subsequent: Also the Record being removed they would not amend it, for they said it was not form but substance, Vide Dyer. 288. 18. Ed. 4. 9.

Phelps versus Lane.

16.

Action. for that the Defendant said of the Plaintiff in presence of divers of the Kings Subjects, Thy Father is a Thief, Innuendo the Plaintiff; After Verdict upon Not guilty, it was moved, That this declaration was not good, because it was not alleged to be spoken to the Son of the Plaintiff, nor in their presence, and the word Innuendo helpeth not, and of this opinion were all the Justices; Wherefore it was adjudged for the Defendant.

Hilton versus Robert Pawle, Hill. 2. Car. rot. 630.

17.

TRespass, for the taking a Saddle of the Plaintiffs at Stoke-goldingham: Upon Not guilty a special Verdict was found, viz. That the Parish of Hinkley in the County of Leicester is, and time whereof, &c. was an ancient Rectory and Parish Church, and that the Village of Stoke-goldingham is an ancient Village, and partell of the Rectory of Hinkley aforesaid; and that from the time of King Hen. 6. and alwayes afterward untill this present, there is and hath been a Church in the said Village of Stoke-goldingham, which, during all the said time, hath been used and reputed as a Parish, and that the Inhabitants of Stoke-goldingham aforesaid, during all the said time, have had all parochial Rites and Church-wardens, and that the said Village of Stoke-goldingham is distant from Hinkley about two miles, and if super totam materiam in forma prædicta Compertam videbitur Justiciariis & Curia hic, That the aforesaid Village of Stoke-goldingham be such a Parish as by the Statute of 43. Eliz. cap. 2. for relief of the poor, is chargeable to the maintaining their own poor: Then they say the Defendant is guilty, to the damage of 7 l. and costs 40 s. and if super totam materiam in forma prædicta Compertam videbitur Justiciariis hic, That the aforesaid Village of Stoke-goldingham stands chargeable by the Statute aforesaid, to maintain the poor of Hinkley aforesaid: Then they say that the Defendant is not guilty: And upon this Verdict, being argued at the Barr by Athoe

Athoe for the Plaintiff and Berkley for the Defendant, the Court resolved and delibered their opinions seriatim for the Plaintiff, That this is such a Parish within the Statute of 43. Eliz. as is chargeable for the relief of the poore of Stoke-goldingham, and not for the poore of Hinkley; For being found, That it was a Church in the time of King Henry the first, & tunc & semper postea reputed for a Parish, and not in the negative, That it was not a Parish before: It may be well intended to be a Parish before, & it doth not exclude, That it was not before time whereof, &c. And although it should not be so intended, yet being found, That it was a Church then, and that there were Church-wardens there, it is a Parish within the Statute, although it be but a reputative Parish; for being in use so long before the Statute, and at the time of the Statute, the Statute appoints that the Church-wardens and three or four Overseers of the Poore joyned with them, shall, &c. and no Church-wardens of Hinkley are Church-wardens of Stoke-goldingham, and by consequence have nothing to do there, and the Church-wardens of Stoke-goldingham are only to meddle with the Church there, and by consequence with the Poore of the Parish; and the Statute hath an intention to confine the relief to Parishes then in esse, and that every Parish should meddle with his proper Village, and their Poore are to be provided for there, and not elsewhere; Wherefore it was adjudged for the Plaintiff. Vide Nicholls case. fol. 394.

OXford *versus* Rivett ante pag. 79. was now moved again, and Richardson, Hurton, and Hurvie held their former opinion, That the Issue was well enough joyned, for there is no mention of any who devastavit in the replication, and necessarily it is intended, That the Mother of the Executor devastavit, for no other might make a devastation; and the Responder being quod prædicta Katherina non devastavit, & de hoc ponit se super patriam, & querens similiter, and being found for the Defendant quod non devastavit, the Plaintiff shall not avoid that Verdict by saying, That it is not shewn who devastavit, so to take exceptions at his own Replication; and Hurton said, admitting that no Issue be joyned, and that the Verdict might not aid it, yet the Judgement shall be against the Plaintiff, for his replication is ill for another cause; for in the Barr the Defendant alledgeth, That she had administration committed unto her durante minore ætate of Rivett the Son of the Intestate, and that he came of age in 9. Jacobi, and that afterwards he refused to be Executor, and the administration was committed to Sir Hugh Wirrell 3. Decemb. anno 19. Jacobi, the Plaintiff replies, That before the commission of the Administration to the said Sir Hugh Wirrell, viz. 6. Octob. 19. Jacobi devastavit, which admitting it should be intended that Katherina devastavit, yet that was a devastation after Rivett the Executor came of age (who came of age in 9. Jacobi, and then she might not be chargeable therewith: So the allegation that devastavit 19. Jacobi is ill, and there-

18.

foze Judgement ought to be giben against the Plaintiff, but for the other point Yelverton and my self held our former opinion, That here is no issue, for intendment will not aid a Replication, and being no issue, the Verdict is void, and not aided by any of the Statutes of Jeofayles; but by the opinion of the other three Justices Judgement was giben for the Defendant.

Westley versus Allen.

19. **A** Prohibition was prayed for Westley against Allen, to stay a Suit in the spiritual Court, concerning the Probate of a Will which was of goods and land, which Will was alledged to be reboked (and so it proved) upon a Suit at the common-Law for the land. Upon Issue of non devisavit, it was proved to be absolutely reboked in toto, and a non devisavit found; and now the Suit is in the spiritual Court to prove it to be a good Will and not reboked. Upon this suggestion the Court gave day, if cause were not shewn to the contrary, That a Prohibition should be granted; For the Court held, That if the question had been in the spiritual Court for Probate of a Will of goods and land, and making an Executor, That they should not proceed to prove the Will quoad the land, but that a special Prohibition as to the land should be granted.

Morant versus Cumming.

20. **M**orant Lessee of the Earl of Hertford against Cumming Vicar of Lirbeck, prays a Prohibition to stay a Suit in the spiritual Court for Tythes, because the lands were parcell of the Forest of Beare, whereof King James was seised in fee in jure Coronæ, and he and all his Predecessors held it discharged of payment of Tythes, and granted it to the said Earl of Hertford in fee, and so he ought to hold them discharged: And it was doubted whether the Patentee may have such privilege, or that it be only a privilege annexed to the Crown during the time that the land was in the Crown; but it was granted de bene esse, unless cause were shewn to the contrary such a day.

Owen versus Thomas app Rees, Hillar. 2. Car. rot. 1789.

21. **A**ction *Sunt Trover* of twenty loads of Wheat, &c. Upon Not guilty pleaded, and a special Verdict, The first question was, Whether a Lease for three lives by Indenture, dated the thirtieth of August anno 20. Eliz. habendum a die datus, and letter of Attorney made the first of September anno 20. Eliz. to make livery, and livery is made accordingly, be a good Lease: because if livery had been made the same day it bear date, and letter of Attorney had been in the same Day, it had been merely void. The second question, admitting, That

That livery by letter of Attorney subsequent be good; whether a Lease being made by a Bishop for three lives, viz. to one for life, remainder to a second for life, remainder to a third for life, so not warranted by the Statute of primo Eliz. cap. 4. and the Successor accepts the rent? Whether this be a good Lease against the Successor himself, who accepted the rent, and shall bind him during his time, so as he cannot enter to avoid it, and make a new Lease? These were the points intended, and were argued at the Barr, but for a fault in the Lease, whereby the Defendant claimed, the matters in Law were not resolved; but Judgement was given for the Plaintiff, without any of the Justices opinions concerning these points; The fault was, That the Bishops there usually by one Lease had let three Manors, reserving 32 l. rent yearly, which was found to be the ancient rent; and the Bishop here makes a Lease habendum to Thomas ap Rees, and his assigns rending to the Bishop and his Successors the usual and accustomed yearly rent, and the Rents and Services at the days and times usually accustomed, and he doth not shew any rent in certain; and because the ancient rent of 32 l. had been usually paid, where the three Manors were let together, and not expressly reserved upon this Lease; therefore all the Court held, That this Lease under which the defendant claims, is a void Lease by the Statute to bind the Successor, and the Successor having entered and made a good Lease to the Plaintiff, if this Lease to the Defendant be not in esse, it ought to be adjudged for the Plaintiff; But in the argument of this Case at the Barr; For the first point a Case was cited betwixt Greenwood and Tyler in the Kings Bench, Trin. 17. Jacobi rex. 1179. where it was adjudged (and affirmed afterwards in the Exchequer Chamber upon a Writ of Error) That if one makes a Lease for life by Indenture dated vicesimo die Augusti, secundo Edwardi sexti, habendum, from Michaelmas following, for three lives, and livery is made by the Lessor after Michaelmas: It is a good Lease by the Indenture (for it was a Lease by *Baron & Feme* of the land of the *Feme*, which ought to inure by the *Died*, otherwise it had not been good to bind the *Feme*, for it was adjudged it bound her) So it seemeth a letter of Attorney, being two days after the *Died*, is as good as if it had been made in person. And for the second point, another Case was cited to be adjudged in the common Bench Pasch. quinto Jacobi Rotulo millesimo quadragesimo primo betwixt Wheeler and Danby, upon an especial Writ in an Ejectione firmæ, for an acre of land in Maysemore in the County of Gloucester, That whereas Richard Bishop of Gloucester was seised in fee of the Manor of Maysemore, whereof this acre is parcel, and by Indenture octavo Elizabethæ Reginæ, demised that acre to Jasper Danby and William Danby, habendum, to the said Jasper, a die datus Indenturæ for his life, remainder to the said William Danby for his life rending three

three shillings two pence by the year, at Michaelmas and the Annunciation, and that the said Richard Bishop of Gloucester dyed, and Godfrey late Bishop of Gloucester was created Bishop, and having notice that divers Rents of the said Manor were due and unpaid, commanded J.W. his Bailiff of the said Manor to receive the said Rents arrear, who accordingly received them, whereof the Rent of the said William Danby was amongst others paid to the said Godfrey, not giving notice particularly to the said Bishop, That the said Rent received of the said William Danby was the Rent of the said William, and that the said Bishop generally anno quadragesimo tertio Regni. Eliz. accepted of all the said Rents by the hand of his Bailiff, and found the Statute of primo Elizabethæ, and that the said Godfrey Bishop of Gloucester, primo die Aprilis quadragesimo quarto Elizabethæ, demised to the said Plaintiff the said Acre and all Tythes growing thereupon for one and twenty years; and that the Plaintiff entered and was possessed until the Defendant William Danby ejected him; and upon this Verdict Judgement was for the Defendant, and it was alledged at the Barr, That it was resolved hereupon, That although the Lease be for life habendum a die datus, yet being found quod Episcopus dimisit, it shall be intended, That liberty was made after the day, and then it was a good Lease. Secondly, this acceptance of the rent by the Bishops Successors, shall bind him for his time, so as he shall not avoid that Lease which was otherwise voidable, because it is a Lease of parcell of the Demesnes, and for two lives, the one after the other in remainder: And the Copy of this Record was brought me, whereby I saw Judgement was given upon this Verdict for the Defendant, but quære whether it were for this cause alledged, or for that the Plaintiffs Lease was not warranted by the Statute of primo Elizabethæ.

22.

Note a common recovery in a Writ of Entry against J. S. for the Manor of D. in the County of Buckingham, was endeavoured to be drawn, and suffered at the Barr, wherein the Tenant prayed aid of the King, by reason of a warrant in the King whereby he warranted that land, and granted to make recompence upon Ejection, and this *aid* prayer was to be instead of a *Voucher*. The warranty being created by fine and recovery drawn in paper, wherein the Tenant vouched the King, and Sir Robert Heath the Kings Attorney (by a Warrant as he said from the King) entered into the warranty, and prayed, That the demandant might count, and so it was drawn, That the Demandant petit versus Dominum Regem, That land (as the usual manner of the Counts in common recovery is) and that the Attorney of the King voucheth over the *common voucher*; but this being perused by the Court, although the Attorney said he had warrant for so doing, yet because such a course hath not been seen, nor any president shewn, That ever any should count against the King as *Vouchee*; and this Course is now

now devised to bar a remainder expectant upon an Estate tail in the King (as a Fine by the King is sufficient to bar an Estate tail in him) and although it is used to be levied by the King, yet that is done by way of render, and not by an immediate Writ of Covenant, therefore the Court would not suffer this recovery to pass, for the King shall never render in value upon *Voucher*, but in such case they ought to sue to the King by petition to have in value, and not by way of *Voucher*. Vid. 9. Hen. 6. 3. & 56. 25. Ed. 3. 39. 39. Ed. 3. 11.

Smith *versus* the Executors of Poyndreill.

Prohibition was granted upon the Statute of vicesimo tertio Henrici octavi, capite nono, for suing for a Legacy of ten pounds in the prerogative Court, whereas the parties dwell in another Diocese, but because the Will was proved in the spiritual Court, and the Suit in the same Court where the probate was, and there Sentence given for the Legacy; and afterwards an Appeal upon this Sentence to the Delegates, where it was affirmed, and Costs taxed, and Excommunication upon the Sentence; and in all this time untill after the Sentence in the Appeal, not any endeavour made to stay these Suits by the said Statute; therefore having so long allowed the Jurisdiction of the said Courts, he came now too late to have a Prohibition, and although a Prohibition was before granted, because the party had not notice to contradict it, yet the Court would not compell the party to appear and plead thereto (as is the usual Course in such cases) but, upon motion, granted a consultation.

23.

Sir Randolph Crew *versus* George Vernon.

Upon a Petition exhibited by Roger Downs Vice-Chamberlain of Chester to the King, he referred the consideration thereof to the Lord Keeper, calling unto him any of the Justices of the Benches, who thereupon called Justice Jones, Baron Denham, Justice Yelverton, and my self. The sole question was, Whether a Commission issuing out of the Court of Chester, betwixt Sir Randolph Crew (late chief Justice) and George Vernon Esquire (now one of the Barons of the Exchequer) to examine Witnesses in a case depending before the Chamberlain of Chester, which was awarded in Hilary Term anno vicesimo secundo Jacobi, returnable in Easter Term following were well executed. The Commissioners beginning the examination of their Witnesses upon the 28. day of March anno 1625. being Monday (which was the day after the demise of King James) and continued in examination of divers Witnesses on both sides untill Friday following, at which day and not before having notice of the demise of the King, they surceased, and returned all what they had done; and upon a motion to the said Court

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for the suppressing of those depositions, as examined without warrant, and before those who had not any authority (as was agreed by all, That by the demise of the King, the Commission was legally determined without any notice) yet the said Roger Downs (upon view of presidents out of the Court of Wards, where such depositions taken in that Court remain, within two dayes after the Demise of the King, and exception taken for stay of publication, yet it was resolved, That they should stand and be published) and upon a certificate from the six Clerks in the Chancery, That they conceived it might well be done, ordered, That for the more legality of the proceeding, a new Commission should issue to the ancient and former Commissioners, That they should examine as many of the Witnesses as were alive, reading to them the former depositions and the interrogatories, and if they affirmed them, then they should stand, if otherwise, they should be suppressed, and such depositions of those which were dead (if any) should stand, and that they should examine any new Witnesses upon the same interrogatories, but not upon others. Whereupon the said George Vernon by petition complaining to the King, accused the said Roger Downs of partiality, and that the Justices of Assise joyned with the said Roger Downs in making orders in this cause, and thereupon obtained another order under the Kings hand to stay the former proceedings; afterwards the said Downs exhibited a petition to the King, suggesting that the former petition was scandalous to the Court, and to the Justices and himself; whereupon this matter was referred to the examination of the Lord Keeper and the Justices; and so upon the examination of both petitions, and hearing counsel on both parts, the Lord Keeper and all the said Justices resolved, and so certified the King, That they conceived this order was just, and great reason that the depositions should stand; For although legally the Commission was determined by the Demise of the King, yet the commissioners not having notice thereof, and having examined concerning the same, they held that such Witnesses were duly sworn, and should be allowed, especially in a Court of equity, where the proceeding be *jure naturali*, and not according to the strict course of Law: And they further certified, That no inconvenience could ensue upon such proceedings before notice of the Kings demise, but if otherwise, it would draw in question many Tryals by Verdicts of Nisi prius, and Tryals and Attainders upon Goal-deliveries, whereupon divers have been arraigned and executed since the Kings demise, and before notice thereof, a multo fortiori they held That the examination of Witnesses should stand; and they further certified, That they approved of the said course, That the Witnesses should be called, and their former examinations and interrogatories tendred to such of them as were alive, and to inquire whether they approved of them, and not to examine them *de novo*; and of the direction to examine the new Witnesses upon the same interrogatories, and not upon others, for then inconvenience might ensue:

And

And lastly they humbly desired, that to rectifie the credit of Dr. Downs, and the proceedings of the Court, his Majesty would be pleased to revoke his order of restraint, and that this certificate now to be made, might be sent into the County of Derby to be read there, and that the proceedings might be according to the former order: Yet for as much as the cause was weighty, That upon the final hearing and determination thereof, the Court might be assisted by the Justices of Assize of the said County, which is without prejudice to the reputation of any of them; and so it was certified accordingly. Upon this conference the Lord Keeper propounded this question unto us. If any Witnesses examined upon such an illegal Commission should be perjured, whether they might be punished by the Statute of quinto Eliz. cap. 9. for that perjury, and we all conceived they might; for being examined before notice of the Kings Demise, what they did was legall, as the Books be in 34. Assis. Pl. 8. 5. Ed. 4. 12. 22. Hen. 6. 29.

Stephens *versus* Potter.

A Case depending before the Lord Keeper, and agreed upon by Counsel on both sides, and set down under their hands, was, That Dr. Tate seised in fee of the Advowson of Wotton, by his Deed let that Advowson and divers other Lands for years, to the Lord Zouch and others, for the payment of his debts, and dyed seised of the Inheritance; some of his Lands being holden by Knight-service in capite, and his Son and Heir Zouch Tate, within age, which was found by office, whereupon the King granted the wardship of body and lands to the said Lessors, rendering Rent to the Receiver or his Deputy within forty dayes after the feast appointed for payment, with a clause to be void for non-payment, The Rent due at Michaelmas anno 20. Jacobi was arrear, and in February 20. Jacobi the Rent was paid to the Receiver, and all Rents after duly paid; the Church becomes void during the minority of the Ward, and afterward the King presents to this Church under the great-Seal, and under the Seal of the Court of Wards, viz. Potter under the Seal of the Court of Wards, as to a Church which appertained to the King *ratione minoris ætatis* of the said Ward, who first obtained institution and induction, and afterward Stephens (under the great-Seal) who likewise obtained institution and induction, and which of these were Parson was the question? And first it was agreed, That the King may present to any Church which he hath in right of Wardship, either under the great-Seal, or under the Seal of the Court of Wards; but a presentation under the Seal of the Court of Wards, if he hath not right to present in right of the Ward, is void, and cannot make an usurpation; because the title to the presentation is void, and so no presentation; and an institution without presentation is void, as it

25.

is held in Greens Case, Coke 6. Rep. fol. 29. and anno octavo Jacobi in the common-Bench, where it was resolved accordingly, That a presentation may be under any Seal. Secondly, it was agreed, That the Lease for years made of the Land and Adbowson under the Seal of the Court of Wards, is not absolutely void by the non-payment of the Rent, reserved upon the said Lease for years, without office, because the Rent was payable to the Receiver or his Deputy, which is matter of fact in *pais*; for there is a difference betwixt a Lease for years, reserving rent payable at the Receipt of the Exchequer, with such provisos, *ut supra*, and when it is payable to the Receiver or his Deputy: For in the first case, The payment or non-payment appears by Record; and therefore to prove the non-payment there needs no office. But in the last case, The payment is to be made to the Receiver or his Deputy, and that appears not of Record, and therefore the Lease not void by the non-payment without office: And so it was said was the resolution in the Case of Sir Moyle Finch and Throgmorton. The third Objection was, Admitting the Lease made of the Wardship to be void for non-payment of the rent without office found, yet, because the King hath but a third part of this Adbowson by the Wardship, upon the Statute of tricesimo secundo Henrici octavi, against Leases made for payment of debts, and hath title to present to the other two parts by his prerogative, which ought to be under the great Seal, (for that shall have the pre-eminence to be preferred in grants) under which of these Seals it ought to have been made? The fourth objection was, That forasmuch as the presentation under the great Seal, and the presentation under the Seal of the Court of Wards, were both the same day; And the presentation under the Seal of the Court of Wards doth not mention the first presentation, and reboke it, whether it shall be good? But to these two last points no opinion was delivered, because the Lord Keeper conceived, for the last reason, That the presentation under the Seal of the Court of Wards was void; And he established the possession with Stephens, the Presenter of the King, under the great Seal.

Termينو Hillarii, anno tertio *Caroli* Regis,
in Communi Banco.

Sir Edward Peto *versus* Pemberton, Mich. 3. Car. rot.

IN Replevin the Defendant made consulate as Bayliff to Humphry Peto, because that Humphry Peto his Father had granted a Rent-charge of six pounds thirtē shillings four pence unto him for his life, and for forty six pounds Rent arrer at the Annunciation primo Jacobi, he distrained and averred the life of the Grantē: The Plaintiff confesseth this grant, but that afterward this land so charged, descended to the said Edward Peto, who let it to the said Humphry Peto for five hundred years, primo Aprilis, decimo Jacobi; And that the said Humphry Peto entred by virtue of the said Lease for years, and was possess, Et hoc, &c. The Defendant rejoyns, That after this Lease, and before any part of the Rent was arrer, viz, decimo sexto Decembris, decimo sexto Jacobi, he surrendered dimissionem prædictam of the said lands to the said Edward Peto, qui ad tunc & ibid. thereto agræd, & hoc, &c. and hereupon the Plaintiff demurred. First, it was objected that the pleading of the surrender dimissionis prædictæ, and not of the Tenements, or of all his Estate therein, was not good, sed non allocatur, for the surrender of the Lease implies all his Estate and Interest, and so it is intended; and although the usual course is to plead surrender of the Estate, yet it is all one, and so much is implied. Secondly, it was objected, That although he hath pleaded a surrender, and that the Lessor agræd thereto, yet because it is not pleaded, that the Lessor entred, the Rent which was suspended remains yet suspended, untill the Lessor enters or waive the possession, Sed non allocatur; For when he pleaded, That the Lessor agræd to the surrender, it shall be intended that he entred; and it is not usual to plead a re-entry upon a surrender, no more than when a feoffment is pleaded, to plead livery and seisin thereof, because it is to be admitted. Thirdly, for the matter in Law, When the Grantē of a Rent for life, accepts of a Lease for years of part of the same land, and surrenders the said Lease, whether the Rent remains suspended during the years, or be revived presently by the surrender? Brampton Serjeant much urged, That it is determined during the term for years; For if he had granted this Lease over, it had passed the Rent inclusively: So in this case where the Lessor surrenders, it is quasi a Grant unto him of the Term, and therefore the Rent shall not be revived; but he agreed, if the Lease

had been to the Grant of the Rent upon condition, and the Lessor had entred for the condition broken, or had recovered in waste, the Rent had been revived, for the Lease is absolutely determined, vicesimo primo Henrici septimi, folio septimo; decimo nono Henrici sexti, folio quarto, & quadragesimo quinto; septimo Henrici sexti, folio secundo; but here the Lessor is in by the Lessee, quasi by his own act; and therefore it shall not be revived: But all the Court held, That the Rent was revived; For by the surrender and agreement of the parties, the Lease is absolutely determined and not in Esse, and none of them can say that it is in Esse; but a stranger who is to have benefit thereby may well say, that it is in Esse as to him; but quoad the Lessor and Lessee, it is determined, and the possession and interest is in him without entry; Wherefore it was adjudged for the Abowant.

Stanford *versus* Cooper, Hill. 2. Car. rot. 2674.

2. **S**cire facias upon a Judgement in Debt, in Termino Hillarii vicesimo secundo Jacobi against one Bill, the Defendant being returned *Terr-tenant*, pleads a Statute acknowledged by the said Bill, vicesimo secundo Januarii, anno vicesimo secundo Jacobi, and an Extent by virtue of the said Statute; And if this Judgement shall relate to the first day of Hilary Term, which was the twentieth of January, being the Efloyn day, or only to the twenty third of January, which was quarto die post, was the question; For if it related to the 20. of January, being the Efloyn day, it is precedent to the Statute, and all the Court agreed, That the Judgement shall have relation to the Efloyn day, for in law it is the first day of the Term, and all legal Acts have relation thereunto, and the quarto die post is the day of grace till when for divers purposes no party shall be prejudiced for not appearing, but as to common intendment it hath relation to the Efloyn day, wherefore being upon a Demurrer it was adjudged accordingly for the Plaintiff, Vid. Dy. 200. & 361. tricesimo quarto Henrici sexti, folio vicesimo; vicesimo secundo Henrici sexti, folio septimo.

Biggot *versus* Smyth, in the Exchequer Chamber.

3. **U**pon an especial Verdict, in the Exchequer, was this Case tried. A man seized of Lands in fee, conveys it by feoffment to the use of himself, and wife, and to the heirs of the survivor of them. The husband afterwards makes a feoffment of this land, and dies, the wife enters, and dies; The question was, Whether by the wives entry the fee shall vest in her surviving, so as her heirs shall enjoy it? And it was adjudged that this feoffment of the husband hath destroyed this future contingent use of the fee; for whatsoever cannot accrue at the time of the death of the party who first dyeth, cannot afterwards, by any act, be revived, but

but is absolutely extinguished. And a Writ of Error being brought in the Exchequer Chamber before the Lord Keeper and Lord Treasurer of England, being both of them Lawyers, and before the two chief-Justices Hyde and Richardson, and before Walter chief-Baron, this Judgement was this Term affirmed, as the said chief-Baron related unto me.

Sir Thomas Holt *versus* Sambach, Trin. 2. Car. rot. 731.

REplevin upon demurrer. The case was, Sir William Catesby Tenant for life of the Manor of Lopworth, remainder to Robert his Son and Heir apparent, and to the Heirs Males of his body, remainder to Sir William Catesby and to the Heirs Males of his body, remainder to the Heirs of the body of the said Robert, remainder to the right Heirs of the said Sir William Catesby; The said Sir William Catesby and Robert (being within age) joyn in a Deed, whereby the said Sir William Catesby grants, and the said Robert confirms to the said Abowant and his Heirs an annual Rent of ten pounds by the year, payable out of the said Manor of Lopworth, to the said Defendant and his Heirs at two feasts, viz. at the Annunciation, and St. Michael, with clause of distress, and nomine pœnæ of twenty shillings for every Month. Sir William Catesby and Robert joyn in a Fine of the said Manor, to the use of the said William and his Heirs, who infeofeth the Plaintiff and dyeth, Robert hath Issue yet living, the Defendant abows for twenty shillings parcel of five pounds due at Michaelmas, anno secundo Jacobi, and because two hundred pounds were due pro nomine pœnæ for two hundred Months, he abows for fifty pounds of this nomine pœnæ: The Defendant sets forth all this matter by way of Abowry, except the Monage and Feoffment to the Plaintiff; and the Plaintiff in bar of the Abowry, shews the Monage of him who confirmed and pleaded the feoffment and averment of the life of the Issue in tapl. Upon this bar to the Abowry, it was demurred and argued at the Barr, and the sole question was, Whether this debt be liable upon the Feoffre: because it was granted by Tenant for life, and confirmed by him in the remainder in tapl, being within age at the time of the Grant; for it was agræd, if a rent be granted by Tenant for life, and confirmed by him in remainder in tapl, within age, That it is issuing out of the Estate for life only, and mærely a void Grant as to the remainder; and if the Tenant for life purchase the remainder or reversion and dies, it shall not bind the Inheritance; And although he had made a Feoffment over, his Feoffre, after his death, should avoid it; but here, because he that made the Grant is not only Tenant for life, but hath a remainder in tapl, and after that a remainder in fee, the rent is issuing out of all his Estates; And although it was void, as against Robert the Son who was next in remainder in tapl, who confirmed it, yet for as much as this Estate tapl is barred by the Fine, and

and the limitation thereof to the use of him and his heirs who granted the Rent, and the Plaintiff being in, as Feoffee to him, the Court inclined in opinion for the Abowants right to the Rent; for the Estate tail being barred, that privilege shall not extend to the Feoffee, for he comes in under all the Estates of the Feoffor, who granted the Rent-charge, and therefore shall hold it charged; but because the Abowry was for twenty shillings parcel of fifty pounds, and the fifty pounds was parcel of the two hundred pounds penalty, and he did not shew, that the residue of the penalty was discharged, therefore it was held, That the Abowry was ill, according to vicesimo Edwardi quarti, folio secundo; quadragesimo octavo Edwardi tertii, folio tertio, and so without regard to the matter in Law it was adjudged for the Plaintiff, upon the insufficiency of the Abowry.

Sir Simon Benners Case.

5. **D**Ebt upon an obligation. The defendant in abatement of the Writ, pleaded that the Plaintiff *puis darraign continuance* was made a Baronet, and it was thereupon doubted whether the Writ should abate, for that the Statute of anno primo Edwardi sexti capite recites the dignities of Dukes, Earls, Viscounts, Barons, Justices of both Benches, and Serjeants at Law, but mentions not Baronets, whereby it seemeth it was not a dignity known at the making of that Statute, but if it were a dignity then known and omitted out of the said Statute, the Court then held it to be out of the Statute; but it was then doubted by the Court whether, if it were a dignity created after the Statute, the said Statute should in equity extend thereunto; and the Court directed, That the Plaintiff should demurr thereunto, and upon argument it should be resolved; but in regard it was only in abatement of the Writ, and it would be but a *Respondes ouster* though adjudged for the Plaintiff, the Plaintiff thereupon offered to bring a new original, and the Defendant consented to appear gratis thereto, and plead in Barr; and so these doubts were left undetermined.

The Lady Chichesley against Thomson and the Bishop of Ely,
Pasch. 2. Car. rot. 302.

6. **Q**Uare impedit to present to the Church of Wimple, and counts, That Sir Thomas Chichesley was seised in fee of the Advowson of the Church of Wimple, as of an Advowson in gross, and presented Marshall, and dyed seised, which descended to Sir Thomas Chichesley the husband of the Plaintiff, who upon the twentieth day of March anno octavo Jacobi, by indenture granted it to Thomas East, and to another in fee, to the use of the Plaintiff for her Joynture, and after to the use of himself in tail, and afterwards dyed seised, the Church becomes void by the death of Marshall,

Marshall, wherefore it belonged to her to present : The Bishop dies, pendant the Writ, and the Defendant pleaded thereto, That he is Parsona imparsonata of the said Church ex presentatione Regis, and shews, That Sir Thomas Chichesley, the Plaintiffs husband died seised in fee of the Abbowson of Wimple, as of an Abbowson in gross, and of the Manor of Preston in the County of Cambridge, holden of the King by Knight-service in capite, and they descended to Thomas Chichesley, Son and Heir, being of the age of two years ; and that an office was found before the Escheator of that County by a Writ of diem clausit extremum, whereby this tenure and descent were found, whereupon the King was seised, and presented the Defendant, who was instituted and inducted absque hoc, That the said Thomas Chichesley granted the said Abbowson to Thomas East, and the other prout, &c. The Plaintiff saith, quod non habetur aliquod tale recordum de inquisitione, and it was thereupon demurred. The first exception was taken to the Barr, because he saith that he is Parsona imparsonata, and doth not say, tempore impetrationis brevis. Sed non allocatur ; for it is inferred by the Writ brought against him : and if he be Parson Imparsonce before the Plea pleaded, it sufficeth, and divers presidents were cited in the new books of Entries, fol. 494, 405, 407. to that purpose. Secondly, it was argued at the Barr, That this replication of traversing the Enquisition is not good, for there never shall be a Travers upon a Travers, but where the Travers in the Barr takes from the Plaintiff the liberty of his Action, for the place or time or such like, there the Plaintiff may maintain his Action for the place or time, and may traverse the Inducement to the Travers, and needs not to joyn with the Defendant in the Travers, but at his pleasure may do the one or the other ; but when the Inducement is made and concluded with a Travers of a Title shewn by the Plaintiff, there the Plaintiff is enforced to maintain his Title, and not to traverse the Inducement to the travers, Vid. 10. Ed. 4. 3. & 49. 12. Ed. 4. 6. 2. Ric. 3. Title Issue 121. Dyer 107. and of this opinion was the whole Court. Thirdly, it was resolved, That for as much as two Titles are comprised in the Barr for the King, viz. the dying seised to the Heir within age, and the tenure in Chivalry, whereby the Wardship is vested in the King, and a Title to present without office, That therefore in the replication they both ought to be answered, and it is not sufficient to traverse the Enquisition ; but she also ought to have answered to the Tenure, and to the descent alledged of the Manor, if the Defendant had relied upon them ; but because the Defendant did not rely upon them, but made them inducements to the travers of the Grant, which is the Plaintiffs Title, that Title ought to be maintained, and not to traverse the Inducements to that Travers ; Wherefore for these causes it was adjudged for the Defendant, Vid. 37. Hen. 6. 6. 24. Ed. 3. 27. 46. Ed. 3. 25. 40. Ed. 3. 11. 9. Hen. 6. 37.

Johns *versus* Rowe.

7. **N**Ote, That upon a Commission to Justice Jones, Justice Whitlock, Justice Yelverton, and my self, and to four other Doctors of Law, in an appeal of Administration committed by Sir Henry Martyn to Anne Row, Wife to Elizabeth Johns late the Wife of Roger Johns; The Husband appealed, pretending that of right it belonged unto him, and not to any of his Wives Kindred; and being divers times debated, as well by common Lawyers, as by Doctors of the Civil Law, it was resolved by Jones, Whitlock, and Yelverton, That of right, the Administration ought to be committed to the Husband, and not to any of the Wives Kindred, by the Statute of 31. Ed. 3. cap. 11. as to the most faithful friend; for as it belongeth unto the Wife upon the Husbonds dying intestate, so it belongeth more properly unto the Husband upon the Wives dying intestate; but they agreed, That the Statute of 21. Hen. 8. both not extend to compell the Husband to take Administration, for that is a penal Law, and extends only to the Wife and Kindred, and not by equity to be extended to the Husband; and for their opinion they relied upon Coke lib. 4. fol. 51. Andrew Ognels Case, That the Administration of the goods of the Wife belongeth in right unto the Husband; but I doubted thereof, and was of a contrary opinion: For the said Book doth not give any reason, nor shew any authority to maintain it, and in reason, the Husband is not to have it de jure, but it is in the power of the Ordinary to commit the Administration unto him, or to the Wives Kindred; for if he ought to have it de jure, he would never suffer the Wife to make any Will for the advancement of the Children by another Husband, or for her Kindred; and the Wife without the Husbonds assent cannot make a Testament, but by his assent she may make him Executor for things in Action, as debts, or *des biens asport* before the Coverture; so it is his default if she dies intestate: Also the Wife is to be intended to be advanced by her Husband, and to have by the custome *rationabiliem partem bonorum*; therefore he is not in such degree as his Wife, and he is not de jure to have the Administration: but the Ordinary may commit it unto him if he please, or he may refuse; and no appeal lies if the Administration be not committed unto him; for it is merely at the Ordinaries discretion; and of this opinion were the Civilians; but afterwards, the said three Justices, in my absence, resolved for the Plaintiff, Vid. 4. Hen. 6. 31. 12. Hen. 7. 24. Coke lib. 9. fol. 38. 34. H. 6. 14. 27. H. 8. 26. 39. H. 6. 27. 18. Ed. 4. 11.

Sir William Crayford *versus* Sir Robert Crayford, Executor of William Crayford, Hillar. 2. Car. rot. 2418.

8. **C**Ovenant, whereas the Testator covenanted with the Plaintiff, That the Manor of Ridgway which he assured unto the Plaintiff

tiff upon his marriage, was of the value of three hundred pounds yearly; he saith, that in truth, it is but of the yearly value of 250 l. The Defendant pleaded, That the said Banco was of the value of 300 l. yearly at the time of making the said Indenture, secundum formam & effectum Indenturæ prædictæ, and upon this they were at issue, and the Jury find an especial Verdict, viz. the Indenture verbatim, as the Plaintiff declareth, wherein the Testator covenanted to stand seised of that Banco, in consideration of marriage, to the use of the Plaintiff, and the Heirs of his body, and covenants, That he was seised of the said Banco at the date of the said Indenture, of a lawful Estate in fee, notwithstanding any act done by him or any of his Ancestors; And that no reversion or remainder was in the King or any other; And that the said Banco was then of the annual value of 300 l. per annum; And that the Plaintiff and his Heirs shall enjoy it according to the limitations discharged, and saved harmless from all incumbrances made by him or any of his Ancestors: And further they found, That this Banco was but of the value of 260 l. per an. at the time of the said Indenture, and no more, and that the Testator had not done any act to impair the said value; And if super totam materiam, &c. So the sole question was, Whether this Covenant for the value depends upon the first part of the Covenant, That notwithstanding any Act made by the Testator or his Ancestors, or if it were an absolute and distinct Covenant of it self? And upon the first argument the Court resolved, That it was an absolute and distinct Covenant, and had no dependance upon the first part of the Covenant, Vide 27. Hen. 8. 29. 7. & 8. Eliz. Dy. 240.

Sands *versus* Trevilian.

ERror of a Judgement in the Common-Bench in debt, where the Plaintiff sued the Defendant, because he retained him being an Attorney in the Common-Bench, to prosecute such a Suit in that Court betwixt one Simms and Worlich and designed him to be Attorney for Worlich, and agreed to pay him his fees, and sheweth that he laid out so much in that Suit for Worlich and that the Defendant had not paid him. After Verdict, upon Nil debet pleaded, it was found for the Plaintiff, and Judgement given. The Error assigned was, That an Action of debt lies not; for the Defendant is but a Solicitor, and there is not any consideration. And it is maintenance in him to solicit Suits, 32. Hen. 6. 25. 21. Hen. 6. 16. Secondly, although the Defendant be suable for this retainer, yet it ought to be in an Action upon the Case, in an Assumpsit, and not in Debt; For there is not any contract betwixt them; And concerning this point the Court doubted, and would advise thereof, Et adjournatur, Vide Bradford and Woodhouses Case, Hillary decimo sexto Jacobi in Banco Regis rot. 416. Vide postea pag. 193.

Termino Paschæ, anno quarto *Caroli* Regis,
in Communi Banco.

Mynn versus Coughton and his Wife.



ACTION upon the Case. *Whereas* the Plaintiff had recovered a debt of thirty pounds against T. D. and did thereupon sue forth a *Capias ad satisfaciendum*, and delivered it to the Sheriff of the County of Cambridge, who had arrested and taken him in execution by virtue of the said Writ, That

the Defendants had rescued him out of the said Execution, by means whereof he went at large, and cannot since be found, so as the Plaintiff is defrauded of his Execution. Upon Verdict found for the Plaintiff, it was moved in arrest of Judgement, That an Action upon the Case lies not against the Defendant for this *Rescous* by the Plaintiff, who recovered; But his remedy is against the Sheriff in debt or Action upon the Case, and the Sheriff ought to have this Action against the Rescousors, for there is not any reason the Defendants should be twice punished, as they should if the Plaintiff should maintain this Action against them, and *Hutton* and *Yelverton* were of that opinion, but *Richardson* Chief-Justice, *Harvie* and my self held, That the Action well lies for the Plaintiff; for he is the party who hath the loss, and to whom the injury was done, wherefore in reason he ought to have the Action, and not be enforced to sue the Sheriff; for perhaps the Sheriff is dead, and then no Action lies against his Executors, wherefore it is just that the Plaintiff should take his election; and if he recover, the parties may plead it if they be sued by the Sheriff, so as there is not any danger of being double charged; Wherefore it was adjudged for the Plaintiff.

Isham versus Morrice.

Ejectione firmæ by the Plaintiff Lessee of the Earl of Kent against the Defendant, Tenant to the Earl of Pembroke. Upon evidence at the Barr, it was held by all the Justices, whereas *Edward* Earl of Salop was Tenant for life of the Manor of Alveton in the County of Stafford, Remainder to *Grace Lady Candish* his Sister of two parts thereof in three parts to be divided for life, the Remainder of the third part

to the said Grace and the Heirs Males of her body, the Remainder over, &c. and she by Indenture inrolled, bargained and sold to the said Edward all her moiety-part and purparty of the said Manor, and Covenants to suffer a recovery for further assurance, which is had accordingly and Grace made the Toucher; first, That this was a good recovery of the intire third part, and not of the moiety of the third part, as it was strongly urged at the Barr, it should be. Secondly, That if one hath interest only in the third part of a Manor, and suffers a recovery of the moiety of the Manor, it is good for the third part. Thirdly, That where one makes a Lease for years of land by Indenture, and hath nothing in the land, and afterward purchaseth the land and aliens it; although it be a good Lease for years by Estoppel against him and his Alienee by way of pleading, and shall bind them; yet it shall not bind the Jury, but they may find the truth; and if they find the truth, the Court shall adjudge it to be a void Lease. Fourthly, That where bargainee by Indenture, after the enrolling of the Indenture and before the inrollment, lets the same land for years, and afterwards the Indenture is inrolled within the six Months; yet the Lease is void; and the relation of the inrollment shall not make it good. Fifthly, That where one is Lessee for years, and assigns over his Lease in trust for himself, and afterwards purchaseth the Inheritance, and occupieth the land, and then levies a Fine with proclamation, and the Trustee doth not claim his Lease within the five years; this Fine and non-claim shall bar the interest of the Trustee, for he who levied the Fine hath the possession by reason of the Trust, and this Trust is included in the Fine, and the Trustee not making claim, his interest is barred thereby. Sixthly, That where one by Indenture, in consideration of money, bargaineth and selleth, demiseth and granteth land for years, and the next day after by Indenture reciting that grant and demise, grants the reversion to divers uses, the Lessee attorns, it is a good grant of the reversion, although there were not any proof, that the Bargainor waived the possession; for the Lessee shall be adjudged in actual possession by the Statute of vicesimo septimo Henrici octavi of uses, and the reversion is immediately divided from the possession, and he hath a good reversion; but in case of a Lease for years at the common Law, untill the Lessee enters, or the Lessor waives the possession, the reversion is not divided, nor passeth by the words of grant of a reversion.

Eaton *versus* Ayloff and his Wife.

3. **P**rohibition was prayed, because they sued in Court Christian for defamation, and speaking these words of the Plaintiff, He was a Cuckold and a Wittal, which is worse than a Cuckold, and that Aylesworth had lain with Ayloffs Wife; and for these defama-

toꝝ words he sued there; and because it was alledged, That for these words, being but words of spleen, Prohibitions had been usually granted, day was thereupon given untill this Term, to shew cause why a Prohibition should not be granted, and divers presidents were shewn, That for calling one Cuckold or Whore, Prohibitions have been granted; But now upon advisement all the Court agreed, That no Prohibition should be granted, but that the spiritual Court should have Jurisdiction thereof: For although they held, That there ought not to have been any Suit for the first words, they being too general, yet being coupled with a particular, shewing that the Wife committed such an offence with such a particular person, they be not now general words of spleen in common and usual discourse and parlance; but they held it was such a defamation as one is suable for in the spiritual Court, whereupon the Prohibition was denyed: Brownlow chief Prothonotary produced several presidents, where Prohibitions had been granted to stay Suits for such words, viz. Trin. decimo quinto Jacobi, rot. 2260. *Purcas versus Birrell*; For that he was presented at several enquests within his Parish for being a Drunkard and a Barretor. And Pasch. sexto Jacobi rot. 397. Prohibition to stay a Suit for calling a Parson Hedg-Priest, Mich. vicesimo primo Jacobi. *Barker versus Pasmore*: She is a Quean and a Tainted Quean, Prohibition granted.

Termino Trinitatis, anno quarto *Caroli Regis*,
in Communi Banco.

Farrington *versus* Keymer.

4. **I**Nformation against the Defendant, upon the Statute of vicesimo tertio Henrici octavi, capite quarto, for selling Beer at another price than is thereby appointed, which is, That the Offendor shall forfeit six shillings for every Barrel, &c. the one moiety to the King, the other to the party, who will sue in any of the Kings Courts by action of Debt, &c. After Verdict at Norfolk Assises, upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgement, That this Information was not maintainable in this Court, for the Statute of vicesimo primo Jacobi, capite quarto, appoints, That Informations shall be before the Justices of peace for such matters whereof they have power to inquire, and not in the Courts at Westminster; and so the Statute being in the negative, the Information is not here allowable; but all the Justices resolved (absente Harvey) That this Information was well brought in this Court. For the first, it was held, That the Statute of vicesimo tertio Henrici octavi, which gives the forfeiture to be recovered in Courts, where no protection, Essoyn, &c. is allowable, extends only to the Courts at Westminster, and not to any other inferiour Court, although Westminster be not named; For an inferiour Court cannot allow protections, or *gager de ley*, and therefore it cannot be sued before the Justices of peace, or *Oyer and Terminer*, as in *Gregories Case*, Coke lib. 6. fol. 19. & Dy. 236. Secondly, it was resolved, That the Statute of vicesimo primo Jacobi makes not any new Law to enable the Justices of peace to meddle with Informations, which were not before appointed by the Statutes to be inquired of before them, and to be sued by Informations, but only appoints, That where Informations may be brought before them, or in the Courts of Westminster at their election; there they shall be brought in the Sessions before the Justices of the peace, or of *Oyer and Terminer* in the Counties where the offence was committed, and that for the ease of the Subjects, who be Defendants. Thirdly, they all said, that the principal doubt in this Case was, whether the Statute of vicesimo tertio Henrici octavi, capite decimo (which appoints that Justices of peace may inquire among other Statutes, of and upon the Statutes of vicuals, Vicualers, Inholders, &c.) extends to give them authority to receive Informations upon

upon the Statute of vicesimo tertio Henrici octavi capite quarto: and if Brewers shall be said Victualers within this Statute? And it was resolved, That they should not; for this Statute of vicesimo tertio Henrici octavi is not properly against Brewers, who are but obliquely punished within that Statute, and the words Victuals and Victualers are properly to be applied and extended against the Ale-house-keepers, who sell by retail and keep not the Ale, and who by the perbiew of the Statutes were inquirable before Justices of peace, as the Statutes of 23. Ed. 3. cap. 6. and of 12. Ric. 2. and other express Statutes are; but Justices of peace, and *Oyer* and *Terminer* are not to enquire concerning this Statute, which is suable in the Courts of Westminster only; Wherefore for this cause it was adjudged for the Plaintiff.

Norton *versus* Fermer.

Prohibition was granted to stay a Suit for tythe of wood, upon surmise that the wood was spent in his house for firing, and shews that the custome in the same Parish is, That the Owners of any house and land in the said Parish, who pay tythes to the Parson, ought not to pay tythes of wood spent for fuel in their houses; and Issue being upon this custome, it was found for the Defendant, and moved in arrest of Judgement, That although it be found there be no such custome, yet he ought not to pay tythes for wood spent in his house, nor for fencing stuff for hedges, but per legem terræ ought to be discharged of them; but the Court resolved, That it is not de jure per legem terræ that any be discharged of them; for it is usual in Prohibitions to alledge customes, as for Harth-penny, or by reason of other lands whereof he pays tythes, That he is discharged of that tythe, but not to alledge, That per legem terræ he is discharged, and the Plaintiff here having alledged a custome, and being found against him, it was adjudged for the Defendant, That consultation should be granted.

5.

Isabel Peels Case.

Prohibition was prayed by her against the Ecclesiastical Commissioners, for that it was by Articles in that Court objected against her, That she was aiding and assistant to Sir H. in the years 1622. 1623. untill September 1624. to have familiar acquaintance with the Vicountesse Purbeck, with whom he committed adultery, and that she was chief Agent for their meetings at unreasonable times, by and through her private Lodgings and passages, by means whereof they took their opportunities to commit adultery, for which offence she was by the said Commissioners upon the seventh day of February anno Domini 1627. sentenced to be guilty of *Bawdry* and *Lenocynie*, and fined two hundred pounds to the Kings use, and enjoyned to make such a penitential

6.

acknowledgement in the Savoy Church as the said Commissioners should appoint, and to be imprisoned untill she found Sureties for the performance of all this Sentence; and for this cause she prayed a Prohibition; For that by the general Pardon in anno vicesimo primo Jacobi she was pardoned for these offences committed in the years 1622. 1623. unto September 1624. and she avers, That she is not guilty of any offence since that time; whereupon the Court granted a Prohibition; for although the time after the Pardon is mentioned in the Sentence, yet it was for offences before the Pardon, and so it stands well with the Sentence, and the averment makes it material: admitting also that part of the offences were committed after the time mentioned in the Pardon, yet the fine being intire, and both the time before and after the Pardon involved together, Justice Hutton conceived that a Prohibition ought to be granted; and for this reason also, because she is sentenced to be imprisoned untill she find Sureties to perform the whole order, which is not warrantable: For although by the Statute of primo Elizabethæ Reginae, capite primo, the high Commissioners may assess fines, or award imprisonment for an offence, yet they can neither commit any to prison for the fine, nor untill the parties find Sureties for the performance of their orders; but they ought to certify the fine into the Exchequer, &c. And Hutton further said, it had been ruled in this Court, That Suits for Adultery (unless such only as were exorbitant and notorious) ought to be brought before the Ordinary in his spiritual Court; neither doth a Suit for Alimony in the high Commission Court lie, for the Commission is grounded upon the Statute; and if they get Commissions of and for other offences, then the Statute appoints, they have no sufficient ground for their proceedings, and several cases were cited to that purpose, viz. Pasch. octavo Jacobi Regis, Doctor Conwards Case, who being sued before the high Commissioners for his Wives adultery, and for being Pandoꝝ unto her, a Prohibition was granted; And Condis Case of Canterbury, who being sued before the high Commissioners upon the election of a Clerk, a Prohibition was granted, because they have not any Jurisdiction for such matters: And one Balams Case, Suit being before them for Battery, a Prohibition was granted, for it is no such offence which the Statute intends to be there suable; whereupon in the principal Case a Prohibition was granted after divers dayes debating, and chiefly upon the Pardon, because it was not any of the offences excepted therein. Note also, That Elizabeth Ash had a Prohibition upon the same Suremise, being joyned in the same Sentence.

Denns Case.

THe case was thus, Thomas Denn being seised of certain lands in fee, and possessed of divers goods, devised the same for the payment of his debts and legacies, and they being paid, the residue and surplus thereof, to his Wife, who he made his sole Executrix, and dyed, and his Wife surviving him, also dyed before probate on any election, The Brothers and Sisters of the woman laboured to get Administration cum testamento annexo, The Plaintiff who was Brother and Heir to Thomas Denn, suggesting that the Will was revoked, and that however the Spiritual Court had no consuance of the probate of Wills concerning lands, they not being testamentary, prayed a prohibition which was granted, for when the question is, whether a Will made of Lands and Goods be revoked, it is properly tryable at the common-Law, but if the question be, whether a Will of Goods only be revoked, it is properly tryable in the Spiritual Court; for they having consuance of the principal matter, shall try also the Accessories; and it was said at the Barr, That they in the Spiritual Court will deny the plea of the revocation of a Will, or at least wise, will enforce to prove it by such Witnesses, as are not to be excepted against in their Law, as Servants, or Kindred, or Legatories, and yet those Witnesses are allowable at the common-Law; and being prayed that the prohibition might be granted to extend only quoad the lands, it was denied and was granted generally for both; for when it is one intire Will of Lands and Goods, and the allegation is to revoke it intirely, it shall not be dis-joyned in the Prohibition; but if one make several Wills, one of his Land, another of his Goods, and revocation is alledged of both, there a Prohibition shall be granted for the one, and denied for the other.

Brown *versus* Hancock.

Assumpsit. After verdict for the Plaintiff, it was moved in Arrest of Judgement, That the promise is alledged to be made beyond the time limited in the Statute of 21. Jacobi, and the Action is not brought within the time limited thereby; and all the Court held, if it appears so by the Plaintiffs own shewing, That the Action is not brought within the time limited by the Statute, the Plaintiff cannot maintain his Action, but Judgement shall be given against him; or if the contract in the Assumpsit or Debt be alledged to be within the time limited by the Statute; and upon non debet or non Assumpsit pleaded, it appears upon the evidence, That the Assumpsit or Contract was beyond the time limited, the Action lyes not, and the Defendant shall take advantage thereof, if it be specially found by the Jury, for the Statute is in the negative, That he shall not maintain

maintain such an action but within the time limited by the Statute ; But in the principal Case it appeared upon the view of the Record, that the Action was brought within the time limited ; And therefore it was adjudged for the Plaintiff.

Homes *versus* Savill.

9. **A**ssumpfit. Whereas divers reckonings and accompts were betwixt the Plaintiff and Defendant, and at such a day, year, and place, they in simul computaverunt for all Debts, Reckonings, and Demands, and the Defendant upon the said accompt was found to be the sum of 20 l. in arrear unto the Plaintiff in consideration whereof he promised to pay unto the Plaintiff the said Debt, &c. That the Defendant licet sapius requisitus had not paid per quod actio ei accrevit, &c. The Defendant pleaded non Assumpfit, and it was found against him ; and it was moved in arrest of judgement, That this Action is not maintainable ; for he ought to have specified the particular matter and causes, viz. pro Mercimoniis venditis, or otherwise, wherefore he should have an accompt, otherwise it lies not ; But the whole Court delibered their opinions to the contrary, That for as much as the accompt may be for divers causes, and several matters and things may be included and comprised therein, which in pede compoti is reduced to a sum certain, wherein it certainly appears he remains and stands indebted ; it is a sufficient ground to maintain the Action, without expressing the particulars for which they accompted, for proof whereof divers presidents were produced where such Actions brought have been adjudged good ; Whereupon Judgement was given for the Plaintiff.

Taylor *versus* Page.

10. **A**ccompt. Upon recit of divers summs, the Defendant pleaded *nunquid* son Receiver, and found against him ; And, being adjudged to account before auditors, he pleaded, That after the recit, and before the Action brought, he had put himself in arbitrament for all Trespasses, Debts, Accounts and Actions, &c. who arbitrated, That he should pay 10 l. only in discharge of all Trespasses, Debts, Accounts and Actions, which he paid accordingly, whereupon it was demurred, and without argument adjudged for the Plaintiff ; For this arbitrament before the Action ought to have been pleaded in barr of the Action, which being omitted, he hath lost the advantage thereof, and shall never plead it before the Auditors ; Whereupon it was adjudged for the Plaintiff. Vid. 22. Hen. 6. 55. 1. Ed. 5. 2. 21. Hen. 7. 31.

Post



Post Terminum Trinitatis, anno quarto
Caroli Regis.

Hugh Pine Esq; his Case.

ONE *William Collier*, attending the said Mr. *Pine* at his house in the Country, was demanded of him, Whether he had seen the King at Hinton, or no? whereunto *Collier* answered, That he had seen the King there. Mr. *Pine* thereto replied, Then hast thou seen as unwise a King as ever was, and so governed as never King was; For he is carryed as a man would carry a child with an Apple: Therefore I, and divers more, did refuse to do our duties unto him. After which words spoken, the said *William Collier*, meeting with *Richard Collier* his brother, asked him, Whether the King were not a wise King? who answered, Yes, he was a wise and temperate King. After which, at another time, *Monsieur Sabiz*, being at Mr. *Pawletts* house at Hinton, Mr. *Pine* asked *Collier*, Whether the King was there or no? who answered, That he heard he was: whereunto Mr. *Pine* replied, That he could have had him at his house, if he would, as well as Mr. *Pawlett*. At another time one *George Morley*, a Lock-smith, being at Mr. *Pines* house, he asked him, What news? whereunto he answered, That he heard the King was at Mr. *Pawletts* at Hinton: Then Mr. *Pine* said, That is nothing; For I might have had him at my house, as well as Mr. *Pawlett*; for he is to be carryed any whither: And then Mr. *Pine* said aloud, Before God, he is no more fit to be King than *Hickwright*. This *Hickwright* was an old simple fellow, who was then Mr. *Pines* Shepherd.

These words being thus proved by *William Collier* and *George Morley*, all the Judges were commanded to assemble themselves, to consider and resolve what offence the speaking of those words were: Whereupon Sir *Nicholas Hyde*, chief-Justice of the Kings-Bench, Sir *Thomas Richardson*, chief-Justice of the Common-Bench, Sir *John Walter*, chief Baron of the Exchequer, Sir *William Jones*, one of the Justices of the Kings-Bench, Sir *Henry Telwerton*, one of the Justices of the Common-Bench, Sir *Thomas Trevor*, and *George Vernon*, Barons of the Exchequer, none other of the Judges being then in Town, met at *Serjeants-Inne* in *Fleet-street*, where they debated the Case amongst themselves, in the presence of Sir *Robert Heath*, the Kings Attorney-General: And divers presidents were then produced.

Kanc. anno vicesimo primo Henrici sexti. Juliana Ridlige filia Wilhelmi Quick, & alii falsi proditores incogniti, in occulto machinantes mortem Regis, &c. prædicta Juliana, ex assensu Wilhelmi, & aliorum proditorum ignotorum, eidem Domino Regi, ut fuit equitans in via adhesit, & dixit eidem Domino Regi, Harry of Windsor, ride soberly, Thy horse may stumble and break thy neck. And when the noble John Beuchamp then said unto her, To whom speakest thou? she answered, To that proud Boy in red, ryding on horse-back, pointing with her hand to the said King. And further calling out to the said King, said, It becommeth thee better to ride unto thy Uncle, than that thy Uncle should ride unto thee; Thou wilt kill him, as thou hast killed thy Mother: Send unto thy Uncle his Wife, whom thou keepst from him. Thou art a fool, and a known fool throughout the whole Kingdom of England.

She had pain fort & dure, because she would not plead.

Berk. anno vicesimo secundo Henrici sexti. Thomas Kerver indictatur, pro eo quod ipse proditorie dixit verba sequentia, Woe to the Kingdom where a Child is King: Et iterum dixit, It had been better for the Kingdom of England by an hundred thousand pounds, if the said King had been dead twenty years before. Et iterum, It had been better for the said Kingdom, by an hundred thousand pound, if the said King never had been born. And, That the Dolphin of France was in Aquitaine and Gascoyn, with a great power, and valiantly fighting, possessing himself of the Land of the King of England in Aquitaine and Gascoyn. And if the said King were but of as much humanity as the Dolphin, who is of his age, the said King might quietly and peaceably hold and enjoy his said Lands. To this he pleaded Not Guilty, and was committed to the Constable of the Tower of London, and afterward recommitted unto Wallingford Castle. Ideo nil ultra apparet.

Suffex. vicesimo nono Henrici sexti. Johannes Clipsham indictatur, pro eo quod ipse & alii dixerunt, Quod Dominus Rex non fuit de potestate, nec scientia, ad Regnum Anglie gubernandum, Et quod noluerunt ulterius obedire Regi, nec gubernationi suæ, infra idem Regnum; minantesque inter se veros populos Domini Regis de Comitatu Kancie, pro eo quod ipsi noluerunt resistere ipsum Regem de Justitia sua infra eundem Comitatum, ac similiter insurrexerunt, &c.

Suffex. anno vicesimo nono Henrici sexti. Johannes Mirfeild & Wilhelmus Mirfeild indictantur, pro eo quod dixerunt, That the King was a natural fool, and would ostentimes hold a staff in his hand, with a bird over the end, playing therewith as a fool; And that another King must be ordained to rule the Land; saying, That the King was not a person able to rule the Land. Et ulterius dixerunt, That the

the Charter that the King made at the first Insurrection, was false; And that he and his fellowship would arise again; and when they were up, they would not leave any Gentleman alibe but such as they list, &c.

Per Indictam. Session, *Suffex*.

Norff. anno tricesimo primo Henrici sexti. Willielmus Bretenham generosus, indictatur pro proditoriis verbis, viz. Quod *Richardus Dux Eborum* extra terram *Hibernie* infra quindecim dies tunc proxime sequentes veniret. & Coronam dicti Domini Regis de eodem Rege auferret, & illud super caput ejusdem Ducis infra brevi poni faceret.

Notatur in margine Indictamenta sic, *Trespas enormia, contempt. & alia offensc.*
Tamen in Indictamento est *proditorie loquebatur, &c.*

Suff. anno tricesimo primo Henrici sexti. Willielmus Ashon Miles indictatur, pro eo quod ipse & alii, proditorie diversas billas & scripturas, in rythmis & balladis, factas & fabricatas, super ostia & fenestras diversorum hominum posuerunt, recitantes in eisdem, Quod Dominus Rex, per consilium Ducis *Suffolcie*, Episcopi *Sarum*, Episcopi *Cicestrie*, Domini de *Say*, & aliorum de Concilio Domini Regis existent, vendidit Regna *Anglie* & *Francie*; Et quod Rex *Francie*, avunculus Regis, regnaret super dictum Regem, dicentes & scribentes hæc omnia & singula. Et similiter miserunt literas hominibus de *Kanc.* ad insurgendum erga Regem, ad adjuvendum Ducem *Eborum*, &c. ad guerram levandum.

Per indictamentum *Suff.* anno 31. H. 6.

Essex, anno tricesimo quarto Henrici sexti. Johannes Gayle indictatur, pro eo quod ipse & alii dixerunt, Quod dictus Rex, & omnes Domini sui circa personam suam, & Concilium suum, falsi sunt; Et quod ipsi petitiones suas, in ultimo Parlamento dicti Regis, apud *Westminsterium* tentum, per ipsos & totam Communitatem *Kancie* petitionat. &c. In vitis dentibus dicti Regis habere voluerunt: Et quod non licet Episcopis dicti Regni ullam potestatem, nec aliquam congregationem Populi erga ipsos ad perturbandum de bonis propositis suis perimplendis, assemblare, nec retinere. Quodque Presbyteri totius *Anglie* nulla bona nec catalla, præter cathedram & candelabrum ad inspiciendum super libros suos haberent & possiderent. Ac quod *Johannes Mortimer*, alias *Cade*, est vivens; & quod ipse esset eorum capitalis capitaneus in omnibus propositis suis perimplendis. Credentes & dicentes, Quod ipsi essent infra tres dies quinque millia hominum armatorum: Et similiter guerram erga Regem levarent.

Habuerunt chartam allocationis eodem Terminò.

Wilsf. anno secundo Eduardi quarti. Oliverus Germaine, Caplor & alii falsi proditores, machinantes & proponentes quomodo Regem *Eduardum*, &c. destruere potuerunt: Et *Henricum sextum*, nuper de facto, & non de jure, Regem *Anglie*, inimicum Regis *Anglie*, auctoritate

ritate Parliamenti reputat. & approbat. infra Regnum *Angliæ*, extra Regnum *Scotiæ* reducere. Et Regem *Edvardum* deponere, &c. Mortem Regis compasser, &c. Credentes & dicentes inter se, in prophefiis, ut falsi Heretici, Quod Dominus *Henricus* nuper Rex, infra breve esset eorum Rex in regno *Angliæ* sicut prius, & Coronam suam in eodem regno haberet & retineret, dicentes hæc omnia ea intentione, Quod veri Populi Domini Regis cordialem amorem extraherent.

Judgement to be hanged, drawn, and quartered.

Norff. anno nono Edvardi quarti. VVilliclmus Belmyn de Norwico, Berter, indictatur, Quod cum *Robertus* de Ryddesdale, à diuturno tempore proponens statum & dignitatem Regis *Edvardi* quarti, &c. adnihilare, &c. Et ipsum Regem per guerram, &c. de Regali, &c. privare, &c. Inter alias falsas prodiciones, &c. diversos Articulos proditorum, &c. fabricavit, publicavit, & proclamavit. Et quod prædictus *VVilliclmus* quandam scedulam tenorem prædictorum Articulorum continent. apud *N.* &c. Monstravit & publicavit & eosdem Articulos pro bonis articulis, & communi utilitati regni expedientes affirmavit, & quamplures personas ad ipsos Articulos manutenendum & approbandum excitavit.

Nota, non dicitur *proditorie* in eodem Indictamento.

Anno decimo septimo Edvardi quarti. Juratores presentant. Quod Thomas Burdet, nuper de *Arrow*, in Comitatu *VVarmici* Armiger, Deum præ oculis non habens & debitum legianciæ suæ minime ponderans ex malicia præcogitata, diabolica instigatione seductus, vicesimo die Aprilis, anno regni Regis *Edvardi* quarti, post Conquestum decimo quarto, & per diversas vices postea, apud villam *VVestmonasterii*, in Comitatu *Middlesexia*, falso & proditorie, contra legianciæ suæ debitum; mortem & destructionem ipsius Regis imaginavit, compassus fuit & circumvit, ac ipsum Regem falso & proditorie adtunc & ibidem interficere proposuit, & ad illud falsum nefandum propositum suum perimplendum, falso & proditorie laboravit & procuravit quosdam *Johannem Stacy*, nuper de *Oxonla*, in Comitatu *Oxon* generosum, & *Thomam Blake*, nuper de *Oxon* in Comitatu *Oxon*. Clericum, apud villam *Westmonasterii* prædictam, duodecimo die Novembris tunc proxime sequent. ad calculandum & laborandum de & circa nativitatem dicti Domini Regis, & *Edvardi* filii sui primogeniti, Principis *Wallie*, & de morte eorundem Domini Regis ac Principis ad sciendum quando iidem Rex & *Edvardus* filius ejus morientur. Dictique *Johannes Stacy* & *Thomas Blake*, scientes illud falsum & nefandum propositum prædicti *Thomæ Burdet*, ipsi *Johannes Stacy* & *Thomas Blake*, dicto duodecimo die Novembris, apud villam *Westmonasterii* prædictam, falso & proditorie mortem ipsorum Regis & Principis imaginaverunt & compassi fuerunt, ac ipsos Regem ac Principem adtunc & ibidem interficere proposuerunt. Et postea, sexto die Februarii, dicto anno decimo quarto, apud villam *Westmonasterii* prædictam, prædicti *Johannes Stacy* ac *Thomas Blake* eorum falsum & proditorium

ditorium propositum perimplendum, falso & proditorie laboraverunt & calculaverunt per artem Magicam, Nigromanciam, & Astronomiam, in mortem & finalem destructionem ipsorum Regis ac Principis. Et postea, scilicet, vicesimo die Maii, anno regni dicti Regis decimo quinto, apud villam *Westmonasterii* prædictam, prædicti *Johannes Stacy* & *Thomas Blake*, falso & proditorie artibus prædictis laboraverunt; licet juxta determinationem sacram sanctæ Ecclesiæ ac doctrinam diversorum Doctorum, cuilibet Ligeo Domini Regis, de intromittendo de Regibus & Principibus, in forma prædicta, absque eorum voluntate, & Preceptis inhibitu fuit. Et postea, iidem *Johannes Stacy* & *Thomas Blake*, ac prædictus *Thomas Burdet*, apud prædictam villam *Westmonasterii*, vicesimo sexto die Maii, eodem anno decimo quinto, cuidam *Alexandro Ruffeton*, & aliis de populo Domini Regis, falso & proditorie manifestaverunt & dixerunt, quod per calculationem & artes prædictas, per ipsos *Johannem Stacy* & *Thomas Blake*, in forma prædicta factas iidem Rex & Princeps non diu viverent, sed infra breve obierent. Ad intentionem quod per detectionem & hujusmodi materiæ manifestationem, Populi ipsius Regis magis ab ipso Rege cordialem amorem retraherent. Et idem Dominus Rex per notitiam illarum detectionis & manifestationis, tristitiam inde caperet & abbreviationem vitæ suæ. Ac quod prædictus *Thomas Burdet*, mortem & destructionem ipsius Regis supremi dicti Domini sui, & prædicti Domini Principis, ac subversionem Legum suarum per guerram & discordiam inter ipsum Regem & ligeos suos in regno prædicto movendum, sexto die Martii, anno regni dicti Regis decimo septimo, apud *Holborn*, in Comitatu *Middlesexie*, falso & proditorie imaginavit, compassus fuit, & circumvit, ac ipsos Regem ac Principem interficere proposuit. Et ad illud falsum nefandum propositum suum finaliter perimplendum, prædictus *Thomas Burdet*, diversas billas & scripturas in rythmis & balladis de murmurationibus, seditionibus, & proditoriis excitationibus, factas & fabricatas apud *Holborn*, & villam *Westmonasterii* prædict. falso & proditorie disperfit, projecit, & seminavit dicto sexto die Martii, ac quinto & sexto diebus Maii, dicto anno decimo septimo, ad intentionem quod Populi Domini Regis cordialem amorem ab ipso Rege retraherent ac ipsum relinquerent, ac erga ipsum Regem insurgerent & guerram erga ipsum Regem levarent in finalem destructionem ipsorum Regis ac Domini Principis, & contra ligeanciam suam, necnon contra Coronam & dignitatem ipsius Regis.

Judgement, to be hanged, drawn, and quartered.

Kanc. anno decimo octavo Edwardi quarti. Johannes Alketer, Peco-
man, nuper serviens *Richard* Comitis *Warwici* & *Sarum*, à diuturno tempore proponens statum Regis pejorare & de regimine, &c. quantum in se fuit proditorie, per diversa verba nefanda, & alia dicta sua venenosa, de diversis murmurationibus, seditionibus proditorum excitationibus factis & fabricatis à gubernatione privare, &c. Ad intentionem quod Populi ejusdem Regis cordialem amorem retraherent, per discordiam inter Regem & Populum suum movendum proditorie

dixit *Willielmo Pend, Willielmo Fowle, & Sampsoni Halk*, sub hac forma, viz. Quod *Willielmus Pend & Johannes Alkerter*, olim servientes dicti *Richardi Comitis Warwici* fuerunt, & nunc quod idem Comes diem suum clausit extremum; Et hoc non obstante infra breve haberent Comitem *Oxonie* (qui superstes est) infra hoc regnum *Anglia*, qui in futuro parcellam hujus patriæ gubernet affirmandoque ulterius verba sua cuidam *Gulfrido Peke*, Quod *Edvardus* quem vos vocatis Regem *Angliæ* falso fuit, &c. dicendo, Quod idem *Edvardus*, per subtilem artem suam, eundem Comitem *Warwici* interfecit & murravit; ac fratrem suum, nuper Ducem *Clavencie*, ad mortem simili modo traxit, non habens causas nec aliquam veritatem; Et dicendo, Quod quicumque inheritabilis sit directe post mortem naturalem *Henrici sexti*, (nunc de facto, & non de jure, Regis *Angliæ*) ad Coronam *Angliæ* ille tantummodo fineret & suus homo esset. Et multa alia hujusmodi verba proditorie dixit.

Utlagatus fuit prout pater per rotul.

Session. Ranc. anno 18. Ed. 4.

Kancia, anno decimo octavo *Edwardi quarti*. *Thomas Hever* inditatur, pro eo quod proditorie dixit, Quod ultimum Parliamentum Domini Regis, apud *Westmonasterium* tentum, magis simplex & insufficienti fuit quam unquam antea: Et ulterius, Quod Dominus Rex proposuit moram suam infra Comitatum *Kancia* trahere & amorem ligeorum suorum ibidem habere, quia amorem cordialem infra eandem Civitatem non habuit, nec in futuro habebit: Et quod si Episcopus *Bathoniensis* morietur, quod tunc immediate *Thomas* Archiepiscopus *Cantuariensis* & Cardinalis *Angliæ* caput suum amitteret. Et multa diversimoda verba proditoria de Rege, quam alia verba malitiosa de Dominis suis, tam spiritualibus quam temporalibus.

Utlagatus prout pater per rotul. Sessionis.

London, Hillar. anno secundo *Ricardi tertii*. *Willielmus Collingbourn*, nuper de *Lydyard* in Comitatu *Wyls*. Armiger, & alii falsi proditores, mortem Regis & subjectionem regni proditorie imaginaverunt & compassi fuerunt: Et ad illud perimplendum, excitaverunt, &c. Quendam *Thomam Tate* ei offerendo octo libras ad partes transmarinas exire, ad loquendum ibidem cum *Henrico*, nuncupante se Comit. *Richmundie*, & aliis, &c. proditorie attinct. per Parliamentum, &c. Ad dicendum, Quod ipsi cum omni potestate, &c. revenirent in *Angliam*, citra festum Sancti *Lucæ* Evangelistæ; Et totum integrum redditum totius regni *Angliæ*, de Terminis Sancti Michaelis, &c. in eorum relevamen haberent; Et ulterius, ad demonstrandum eis, Quod per concilium ipsius *Willielmi Collingbourn*, si dictus comes *Richmundie*, & alii, &c. ad terram *Angliæ*, apud *Poole* in Comitatu *Dorcestria*, arrivare voluerunt. Ipse *Willielmus Collingbourn* & alii proditores, eis associando commotionem populi ipsius Regis, insurrectionem & guerram erga ipsum Regem interim levare causarent; & partem ipsorum falsorum proditorum contra Regem in omnibus acciperent; & omnia infra regnum *Angliæ* ad eorum dispositionem essent; Et ulterius, ad dicen-

dum

dum & demonstrandum dictis proditoribus, &c. ad destinandum *Johannem Cheyney* usque ad Regem *Francie*, ad demonstrandum sibi, quod Ambasiatores sui in *Angliam* à dicto Rege *Francie* venientes, defraudari debeant : Et quod Rex *Anglie* nullum promissum eis custodiret ; sed solummodo ad deponendum, seu ad respectuandum, guerram inter Dominum Regem tempore Hiemali : Eo quod in principio temporis *Æstivalis*, Anglica potestas in omnibus preparari possit ad bellum dicto Domino Regi *Francie* præbendum, & eundem Regem & terram suam adtunc finaliter destruendo. Et ulterius ad advisandum ipsum Regem *Francie* ad auxilium dictorum proditorum pecuniis, &c. Utripse iter Regis *Anglie* usque terram *Francie*, impedire proponer. Et sic prædictus *Willielmus Collingbourn* & alii, fuerunt proditorie adhaerentes, &c. Et quod prædictus *Willielmus Collingbourn*, & alii falsi proditores, Deum præ oculis, &c. à diutino tempore, intendens per Covinam, assensum & voluntatem diversorum aliorum proditorum eisdem proditoribus adhaerentium, &c. associaverunt. Et mortem Regis per guerram, commotionem, & discordiam inter Regem & Ligeos suos, infra regnum *Anglie* levandum, compassi fuerunt, &c. Et ad illud perimpendum, prædictus *Willielmus Collingbourn*, & alii, diversas billas & scripturas in rythmis & balladis de murmurationibus, seditionibus, & loquelis, & proditoriis excitationibus, falso & proditorie fecerunt, scripserunt, & fabricaverunt, & illas per ipsos sic factas, scriptas, & fabricatas, die, &c. super diversa ostia Ecclesiæ Cathedralis sancti *Pauli London.* proditorie posuerunt, & publice ibidem fixerunt, ad movendum & excitandum Ligeos Regis billas & scripturas illas legentes & intelligentes, commotionem & guerram erga ipsum Regem facere & levare, contra ligeanciam suæ debitum & finalem destructionem Regis, & subversionem regni, &c.

Judgement, to be hanged, drawn, and quartered.

London. anno nono Henrici septimi, *Thomas Bagnall*, & alii, mortem Regis imaginaverunt, &c. Et ad intentionem prædictam, Quod Populi Regis cordialem amorem retrahere, &c. diversas billas & scripturas in rythmis & balladis de murmurationibus, seditionibus, & proditoriis excitationibus, tam versus Regem quam alios magnates de Concilio suo tangent. proditorie fecerunt, &c. super ostium Ecclesiæ sancti *Benedicti* in *Gracious-Stræt*, & super *le Standard* in *Cheap*, ac super ostium Ecclesiæ *Pauli* posuerunt, &c. Et quod ipsi fuerunt adhaerentes cuidam *Petro VVarbeck* inimico Regis in partibus transmarinis, existent. ad levandum guerram ad deponendum Regem.

Judgement, to be hanged, drawn, and quartered.

Middl. decimo Henrici septimi, *VVillielmus Stanley* miles, & *Robertus Clifford* miles, ad invicem inter se communicaverunt & interlocuti fuerunt de quodam *Petro VVarbeck* de *Thornaco* sub obedientia Archiducis *Austrie* & *Burgundiæ*, inimico Domini Regis, &c. falso nuncupante se fore *Richardum*, secundum filium Domini *Edwardi*, nuper Regis *Anglie*, quarti, in partibus exterioribus ultra mare existent. ac

mortem, &c. Regis ac subversionem regni *Angliae*, proditorie conspiraverunt, &c. Et eundem Regem per guerram, &c. in regno *Angliae*, levandum de Corona, &c. deponendum, &c. Et ad illud perimplendum, &c. prædicti *Willielmus Stanley* & *Robertus Clyfford* proditorie, &c. inter se aggregati fuerunt, quod ipse *Robertus* ad partes externas prædictas, ad præfatum *Petrum Warbeck*, &c. transiretaret, & in ipsius *Petri* adventum ad guerram levandum expectaret. Et ipsum *Petrum*, in regnum *Angliae*, cum toto posse suo introduceret, & ipsum in Regem erigeret, &c. Et ulterius, Dictus *Willielmus Stanley* præfato *Roberto Clyfford* proditorie promissit, &c. ad quodcunque & quotiescunque ipse *Robertus Clyfford* aliquos ad domum *Willielmi Stanley* à partibus exterioribus, per privatum signum inter ipsos habitum, destinaret, pro ipsius ac dicti *Petri VVarbeck* inimicorum Regis, &c. adjuvamine; ipse *Willielmus Stanley* eos cum toto posse adjuvare veller, &c. Quorum, &c. prætextu, dictus *Robertus Clyfford* iter suum ad partes externas, præfato *Petro VVarbeck*, arripuit, &c. Et sic fuerunt adhærentes, &c.

Judgement, to be hanged, drawn, and quartered.

Surrey. anno tricesimo Henrici octavi. Henricus Marchio, Exon. proditorie dicebat, I like well of the proceedings of Cardinal Pool, Et ulterius, But I like not the proceedings of this Realm: And, I trust to see a change of the world. Et ulterius, I trust once to have a fair day upon those knaves which rule about the King. Et ulterius, I trust to give them a buffet one day. Et quod *Nicholam Carew* Miles, malitiose & proditorie murmuravit, & indignatus fuit, & dicebat hæc verba Anglicana, I marvel greatly that the Indictment against the Lord Marques was so secretly handled, and to what purpose; for the like was never seen.

Per bagam Sessionis tent, coram *Thom. Audley* Cancellar. & alios, 30. *Hen. 8.*

Berkf. tricesimo primo Henrici octavi. John Rugg, Chivaler, for these words, The Kings highness cannot be supreme head of the Church of England by Gods Law. *Hugo Abbas de Reading* superinde dixit, What did you for saving your Conscience, when you were sworn to take the King for supreme head? Et superinde prædictus *Joh. Rugg* dixit, I added this condition in my mind, To take him for supreme head in temporal things, but not in spiritual things.

Per Indictam. Mich. 31. *Hen. 8.*

Kanc. anno tricesimo primo Henrici octavi. Robertus Rumwick indictatur, Quod cum diversi fuerunt comedentes & compotantes, &c. *Thomas Brook*, tenens quendam ciphum cervisæ impletum, &c. dixit, God save the King, Here is good Ale. Ad quod prædictus *Robertus* dixit proditorie, &c. desiderans mortem Regis, &c. God save the cup of good Ale; for King Henry shall be hanged, when twenty others shall be saved. Cui prædictus *Thomas* dixit, Knowest thou what thou sayest? Prædictus *Robertus* iterum dixit, ut supra, God, &c.

Leicest.

Leiceſt. anno triceſimo tertio Henrici octavi. Lionellus Haughton, nuper de Oremſhirk in Comitatu Lancaſtrie, Taylor, pro verbis, viz. being ſhooting at the Butts ſaid, I would the Kings body had been there as the arrow did light; And, By the Gods I would it had been in his body.

Per indictament. Mich. 33. H. 8.

Edward Peacham was endicted of Treason, for divers Treasonable passages in a Sermon, which was never preached, or intended to be preached, but only set down in writings, and found in his study: he was tryed and found guilty, but not executed. Note, that many of the Judges were of opinion, That it was not Treason.

Henry Challercomb was also endicted of Treason for words, and was found guilty, and executed.

John Williams was also endicted, found guilty, and executed, for writing a Treasonable book, called *Baalams Asse*.

Upon Consideration of all which presidents, and of the Statutes of Treason, it was resolved by all the Judges before named, and so certified to his Majesty, That the speaking of the words before mentioned, though they were as wicked as might be, was not Treason: For they resolved, That unless it were by some particular Statute, no words will be Treason; for there is no Treason at this day, but by the Statute of *viceſimo quinto Edwardi tertii*; for imagining the death of the King, &c. And the endictment must be framed upon one of the points in that Statute; And the words spoken here can be but evidence to discover the corrupt heart of him that spake them: but of themselves they are not Treason, neither can any Endictment be framed upon them.

To charge the King with a personal vice, as to say of him, That he is the greatest Whoremonger or Drunkard in the Kingdom, is no Treason, as *Yelverton* said it was held by the Judges, upon debate of *Peachams Case*.

1870
The first of the year
was a very dry one
and the crops were
very poor.

The second of the year
was a very wet one
and the crops were
very good.

The third of the year
was a very dry one
and the crops were
very poor.

The fourth of the year
was a very wet one
and the crops were
very good.

The fifth of the year
was a very dry one
and the crops were
very poor.

Termino Michaelis, anno quarto *Caroli* Regis,
in Banco Regis.



IN this Vacation, viz. upon the eleventh day of September, *anno Domini* 1628. Sir *John Dodridge*, one of the Justices of the Kings Bench, dyed at his house in *Egham*, in the County of *Surrey*; a man of great knowledge, as well in the Common Law, as in other humane Sciences, and Divinity. After whose death, because there were five Judges in the Common Bench, whereof my self was the fourth, whereas usually there were but four in the said Court, and as many in the Kings Bench. The King, intending to reduce those Courts to their usual course, upon the three and twentieth day of the said September (having had communication with the Lord *Coventry*, Lord Keeper of the great Seal) nominated me to be one of the Justices of the Kings Bench, and signed a Warrant the same day for my Patent, to be Justice there; and another warrant reciting my first Patent of Justice of the Common Bench, and determining his pleasure concerning that place (saving all wages and sums, &c.) And the Patent of Justice of the Kings Bench was sealed upon the ninth day of October, and bare date the same day; and the Patent of revocation of my place of Justice of the Common Bench was sealed upon the tenth day of October, and both Patents were delivered me upon the eleventh day of that Moneth, at such time as I was sworn Justice of the Kings Bench. And a question was then moved about my antiquity, I having one Justice in the Common Bench (viz. Justice *Telverton*) and two of the Barons in the Exchequer (viz. *Treuer* and *Vernon*) my *puisfages*, and had not a clause of saving superiority, precedency, and antiquity, as was in the second Patent of Justice *Nichols* (he being first one of the Judges in the Common Bench; and having a Patent to discharge him from that place was then made the Princes Chancellor, and two dayes after Justice of the Kings Bench, with an expresse exception and allowance to be Chancellor to the Prince, and saving his precedency and seniory;) but all the Justices, assembled at the Lord Keepers house, agreed, That I needed not such a saving, For my Patent continued untill the time I was Judge of the Kings Bench, and I never ceased to be a Judge, but was translated only: And the Justices conceived, The Patent of revocation of my Justice place in the Common Pleas

Pleas was needles ; becaufe, by making me Justice in the Kings Bench, my former Patent was in Law determined, according to the Case in *quinto Marle, Dyer 159*. Yet, for better security, there was one made, according to the president of Justice Jones his Patent, when he was removed out of the Common Pleas to be Judge in the Kings Bench.

Cusacks Case.

2. **C**Usack was condemned in the Sheriffs Court in London, for Debt, and taken in execution : Afterwards, by an Habeas Corpus upon suit in the Kings Bench, the said execution, with other Causes, were returned ; Whereupon he was committed to the Marshal in execution for that debt, and other his executions in the Kings Bench. And now all the Executions in the Kings Bench were discharged ; and the Judgement in London reversed, by a Writ of Error in the Hustings : And how he should be discharged of this Execution was the question ? For this Court hath no Record of the Execution, but by the return of the Habeas Corpus. And of the reversal of that Judgement they have not any Record, but what is only surmised ; And they may not award a Cerciorare to London, for they there will not return it : Whereupon it was advised, That all matters here concerning that Execution being discharged, he might be remitted to London for that cause, and there be discharged. Vide vicesimo nono Edvardi tertii, folio quadragesimo septimo ; quadragesimo octavo Edvardi tertii, folio vicesimo secundo ; tricesimo nono Henrici sexti, folio quinquagesimo quarto & quinto Philippi & Mariæ, Dyer 152. tertio Elizabethæ, Dyer 187.

Geery *versus* Reason.

3. **C**ovenant. The Plaintiff declares, That by Articles indented, shewn, &c. in anno Dom. 1624. he demised to the Defendant certain Rooms in Bear-Alley, untill Midsummer anno 1626. rendring the sum of six pound and thirteen shillings four pence rent, provided, and upon condition, That the said Reason shall gather the rents of other the Plaintiffs Tenements in Bear-Alley, reserved quarterly and mentioned in a schedule, and pay the same within twenty dayes after every quarter day ; And it is agreed, That the said Reason shall retain the rest of the benefit to be made of the said Rooms, over and above the said six pounds thirteen shillings four pence *per annum*, for his pains in gathering up the said Rents : And shews, That the Rents were mentioned in the schedule, and amounted unto an hundred and ninty pounds *per annum* ; And, That the Defendant had not paid the said Rents : But he did not shew, that the Defendant had gathered them ; And thereupon the Defendant demurred. For it sameth, That here is not any Covenant, to gather or pay the Rents ; but a forfeiture of his Lease, if he do not gather, and

and pay them, being gathered: and if he doth not pay them, being gathered, an account lies; But *Germin* for the Plaintiff insisted much, That these words, *Provided, &c.* in the Indenture shall make a Covenant; but all the Justices conceived it is not a Covenant, but merely a Condition annexed to the Estate, which determines it by not collecting and paying the rent: And it is not to be intended, That it should be a Covenant to enforce him to gather and pay them, where peradventure he cannot collect them. And thereupon, without argument, it was adjudged for the Defendant.

Chamberlaine versus Turner.

Ejectione firmæ for an house called the White-Swann in Old-street in London. A speciall Verdict was found, That *Henry Metcalfe* was seised in Fee of the said house, and of a garden thereto appertaining, and held it in Sorage, and made his Will in this manner, which is found verbatim. I devise all my Fee-simple Lands, Goods and Tenements, to *Henry Metcalf* my Son, and the Heirs males of his Body, and for default of such issue remainder to his right Heirs; and made him Executor, and appointed that he should pay his debts out of his Goods and Lands. And I devise the House or Tenement, wherein *William Nicholls* dwelleth, called the *White-Swanne* in Old street, to *Henry Gallant* my Daughters Son for ever. And the Jury found, That the said *William Nicholls*, at the time of the said Will making, and of the Testators death, inhabited and occupied the entry or Alley of the said house, and three upper rooms therein: And that divers other persons at the same time, held and occupied the Garden, and other places in the said house; And that *William Heylock* and his Wife held another room; And that *Henry Gallant*, claiming that house, entred and made a Lease thereof to the Plaintiff; and the Defendant, by the command of the said Metcalf, Heir of the Devisor, ousted him. Et si super totam materiam, &c. This Case being argued at the Bar by *Banks* and *Calthrop* for the Defendant, and by *Andrews* for the Plaintiff, two Questions were moved; First, Whether the Heir of *Gallant* had any more than an Estate for life by this devise, because all his Fee-simple Lands, being before devised to his Son and Heirs Males, he afterwards devised that house to *Henry Gallant* for ever? And if it be but an Estate for life, extracted out of the first Estate, then it is determined; and he relied upon *Alice Ludhams Case* in decimo nono Elizabethæ, *Dyer* 357. But all the Court resolved, That it is a Fee-simple, because of the words in perpetuum, or for ever; And it is not like the Case of *Alice Ludham*. where an express Fee was given to one, and after his death devised to another for life. The second Question was, Whether all the House passed, or the Entry, and those three Rooms which were in the possession of the said *William Nicholls* only; and *Hid* chief Justice doubted thereof; For it may be intended that he did

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not devise more than Nicholls occupied? But Jones, Whirlock, and my self were of opinion, That all the house passed to the Devisee; for the Devise being, That house or Tenement, and the conclusion, called the White-Swan, doth both of them necessarily import the whole house; for the Sign of the White Swan cannot be intended to referr to three Rooms: And the words after, viz. wherein William Nicholls dwelleth, doth not abridge or alter that devise; And the house being named by the particular name of the White-Swan, although William Nicholls never inhabited therein, yet it passeth by the Devise, and is good, because he inhabited therein, although he occupied but three Rooms of it; But if the house had not been named by the particular name of the White-Swan, and he had devised the house in the occupation of William Nicholls, there peradventure it should not extend to more than what was in the occupation of William Nicholls, and not to that which was in the occupation of others, according to the Case of Andrew Ognell, Coke lib. 4. fol. 48. And the Case of Hunt and Singleton, where a Lease was made to one Cales of an house, and he lets out of that two Chambers, and after surrenders the Lease, and a new Lease was made to the said Cales of the house in his occupation; it was adjudged only of the house in his occupation, and not of the two Chambers; for there was a good Lease of the house, although the two Chambers were not devised; but the devise being of the house called the White-Swan, wherein Nicholls inhabiteth, cannot be intended, That the devise shall be of the three Chambers only, because it cannot be termed the house called the White-Swan: And whereas it was objected, That it is not found, that Henry Metcalf had other lands in fee-simple to supply the first devise, and therefore necessarily it ought to be extended to the residue of that house, and then it passeth not all: The Justices answered thereunto, That it ought to be intended, although it be not expressed that he had other lands; and the doubt of the Jury was, whether the intire house passed by those words: So if they be satisfied, the Court shall not doubt of more than what the Jury have found: Et adjournatur, & postea fuit adjudged accordingly.

Inkerfalls versus Samms.

5. **A** Sumpsit against the Defendant as Executor. Whereas the Testator in his life, viz. upon the sixteenth day of October, anno decimo octavo Jacobi Regis, in consideration of five pounds lent unto him, promised to pay, &c. The Defendant pleads, That the Testator non assumpsit; the Jury find that the Testator assumpsit modo & forma, but that the Testator dyed such a day, viz. in anno decimo septimo Jacobi, so as he was dead a year and more before the time which is alledged in the Record. And at the first argument the Court held for the Plaintiff, That the Verdict being, That the Testator assumpsit modo & forma, the finding over that the

the Testator dyed before the time mentioned in the Declaration, is idle, superfluous, and not material, nor is the day of the Assumption material: And although he were dead before the day mentioned in the Declaration, it is good enough; And thereupon it was adjudged for the Plaintiff. Vid. vicesimo tertio Elizabethæ, Dyer 372. Coke 2. Rep. fol. 4. Goddards Case.

Halloways Case.

Halloway was indicted and arraigned at Newgate, for murdering one Payne. The Indictment was, That he ex malicia sua præcogitata tyed the said Payne at an horses tail, and struck him two strokes with a cudgell, being tyed to the said horse, whereupon the horse ran away with him, and drew him upon the ground three furlongs; and thereby brake his shoulder, whereof he instantly dyed, and so murdered him. Upon this Indictment, he being arraigned, pleaded Not Guilty; and thereupon a speciall verdict found, That the Earl of Denby was possessed of a Park called Austerly Park, and that the said Halloway was Woodward of his Woods in the said Park, and that the said Payne with others unknown entred the said Park, to cut wood there, and that the said Payne climbed up a tree, and with an hatchet cut down some boughs thereof, and that the said Halloway came riding into the Park, and seeing the said Payne on the tree, commanded him to descend, and he descending from thence, the said Halloway stroke him two blows upon the back with his cudgell; and the said Payne having a rope tyed about his middle, and one end of the rope hanging down, the said Halloway tyed the end of that rope to his horses tail, and struck the said Payne two blows upon his back; whereupon the said Payne being tyed to the horses tail, and the horse running away with him, drew him upon the ground three furlongs, and by this means brake his shoulder, whereof he instantly dyed; and the said Halloway cast him over the pales into certain bushes. And whether upon all this matter found, the said Halloway be guilty of the murder pro ut? they pray the discretion of the Court; and if the Court shall adjudge him guilty of the murder, they find him guilty of the murder; If otherwise, they find him guilty of manslaughter; and this special verdict by Cerciorare was removed into the Kings Bench, and depended three Terms: and the opinion of all the Judges and Barons was demanded, and they all (besides Hutton, who doubted thereof) held clearly, That it was murder. For when the Boy, who was cutting on the tree, came down from thence upon his command, and made no resistance, and he then struck him two blowes, and tyed him to the horses tail, and then struck him again, whereupon the horse ran away, and he by that means slain; the Law implies malice, and it shall be said in Law to be premeditated malice, he doing it to one who made no resistance: And so this Term all the Justices delivered the reason of their opi-

nions ; whereupon Judgement was given, and he was adjudged to be hanged, and was hanged accordingly.

Juxon versus Thornhill, Trinity 4. Car. rot. 76.

7. **A** *Stumpfic.* Whereas the Plaintiff by the Kings licence, had erected in Godmanchester, and in five other places in his own land, six several Sluces or Locks upon the River Ouse, for the better raising and heightning the water in the River, for the easier passage of Boats through the said Locks. And the King had granted unto him to take such reasonable summs for the passage through the said Locks, as should be agreed upon betwixt him and those who should have such passage : And for that there was contention betwixt him and the Defendant, and divers others, what summs should be paid for such passage, a petition was thereupon presented to the Lords of the Countell, and by them referred to the Earl of Manchester, Lord President, to set down what rates those which passed through the said Locks should pay. That the Defendant in consideration the Plaintiff would permit him to pass through the said Locks, upon the twentieth day of October, anno tertio Caroli Regis, promised unto the Plaintiff, That he would pay him such summs as the said Lord President should appoint ; and alledgeth in fact, That between the said twentieth day of October, and the twenty third day of Aprill following, he passed through the said Locks with his boats, and carried two thousand one hundred and twenty tonns of coal. And that upon the twenty fourth day of Aprill, the said Earl of Manchester set down and ordered, That two pence half penny should be paid for every tonne which passed through the said Locks, in every Lock two pence half penny : And that for the said two thousand one hundred and twenty tonne, according to the said rate, the Defendant ought to pay him eleven pounds. And that upon the twenty ninth day of Aprill then next following, he requested the Defendant to pay the said eleven pounds, and he refused to pay it ; whereupon he brought this Action ; the Defendant pleaded non assumpsit, and it was found against him, and now moved in arrest of Judgement ; First, That it is no good consideration, because the River of Ouse is a common River, and it is not lawfull for any to make stops upon the River, or to take summs of money for the passage through the Locks. Sed non allocatur : For the Locks are upon the Plaintiffs own land, and at his cost, for the exaltation of the water, and making the River navigable for Vessels of burthen ; and it stands with good reason that they should pay for their passage, according to their agreement. The second exception was, Because it is not shewn that the Defendant had any notice given him of the Earl of Manchesters order ; sed non allocatur, because he ought to pay as much as he should appoint ; and the Defendant is to take notice of his order, as well as the Plaintiff, he being a stranger to both ; as where one is obliged

obliged to perform an arbitrament, there needs not any notice be given unto him, but he ought to take notice at his perill. Also the Plaintiff alledgeth, That he required the summe according to the Order which is an implied notice; Whereupon rule was given, That Judgement should be for the Plaintiff, unless further matter should be shewn to the contrary by such a day.

Chambers Case.

8. **C**hambers being in prison in the *Marshalsey del hostel de Roy*, desired an Habeas corpus, and had it; which being returnable upon the sixteenth day of October, the Marshall returned, That he was committed to prison the twenty eighth day of September last, by the command of the Lords of the Councell. The Warrant verbatim was, That he was committed for insolent behaviour, and words spoken at the Councell Table, which was subscribed by the Lord Keeper and twelve others of the Councell. And because it was not mentioned what the words were, so as the Court might adjudge of them, the return was held insufficient, and the Marshall advised to amend his return, before the twenty first of October following; and he was by rule of the Court appointed to bring his Prisoner then, without a new Habeas corpus, and the Prisoner was advised, That in the mean time he should submit to the Lords, and petition them for his enlargement. Upon the said 21. of October the Marshall had his Prisoner there; but because the great Case of Sir William Wichpole was to be debated that day, and time would not permit to treat of this matter; The Marshall was commanded to bring again his Prisoner, and have him in Court the twenty third day of October. Then Germin for the Prisoner moved, That so far as it appeared by the Return, That he was not committed for Treason or Felony, nor doth it appear what the words were, whereto he might give answer; he therefore prayed, he might be dismissed or bayled. But the Kings Attorny moved, That he might have day, untill the twenty fifth of October, to consider of the return, and be informed of the words, and that in the interim the Prisoner might attend the Councell Table, and petition. But the Prisoner affirmed, That he oftentimes had assayed by petition, and could not prevail, although he had not done it since the beginning of October; and he prayed the Justice of the Law, and the Inheritance of a Subject: Whereupon, at his importunity, the Court commanded him to be bayled; and he was bound in a Recognizance of four hundred pounds; and four good Merchants his sureties were bound in Recognizances of one hundred pounds a piece, That he should appear here in Crastino animarum, and in the interim should be of good behaviour; And advertized him, They might, for contemptuous words, cause an Endiament or Information, in this Court, to be drawn against him, if they would. Residuum postea. pag. 168.

Sir William Withipoles Case.

9. **SIR** William Withipole being endicted, before the Coroners, for the murder of Madyson, and being arraigned upon that enquest, informed the Court, he had matter in Law to plead, to avoid that endiament, and that he ought not to be put to answer; and prayed that Councell might be assigned him: And Br. Noy and others were assigned, who, at another day, put in a Plea for him, That he ought not to be impeached upon this Endiament; for he shewed in his Plea the Statute of undecimo Henrici quarti, capite nono, That none shall be put upon any pannel of Enquest, at the denomination of any person, unless by the Bayliffs and ministers of the Sheriffs, sworn and known; And that the said Jurors should be probi & legales homines; And further pleads, That Alston the fore-man of the Jury, nominated himself to be of the Jury, and fourteen others, (shewing their names) and one Alexander Farrington required him to return them, he not being Sheriff, nor Bayliff of the Franchise, nor any minister of any Sheriff, nor Bayliff of any Franchise, who ought by the Law to return them; And by the said Jury the said inquisition was found; and he further pleaded, That two of the said Jurors were outlawed in Actions of debt, the one in the twelfth year of King James, the other in the first year of King Charles, and produced the Records, being sent by Mittimus out of the Chancery; and averred, That the outlawries are yet in force, not reversed nor vacated. And upon this Plea pleaded, the Court would advise whether it should be accepted, and what should be done thereupon, either demurre or joyn issue. The first Question was, Whether the Statute of undecimo Henrici quarti extends to Enquests before Coroners, or only to Endiaments before Justices of the peate, and of Oyer and Terminer? Secondly, Admitting, That this Statute extends thereunto, Whether it extends to persons outlawed in personal Actions, or only to persons outlawed for Felony or Treason; And because this was the first plea that had been upon that Statute, and would be a president in Crown matters, the Court would advise. And all the Justices of both Benches, and Barons of the Exchequer, met thereupon at Serjeants-Inne in Fleetstreet; and having had conference of these points, the greater part of the said Justices and Barons were of opinion, First, That the Statute of undecimo Henrici quarti extends as well to Enquests before the Coroners, as to Endiaments before Justices of peace. Secondly, That it extends to persons outlawed in personal Actions, because an outlawed person is not accounted probus & legalis homo to be sworn in an Enquest, and may be challenged for that cause, Vide 34. Edwardi primi, proces 208. 21 Hen. 6. 30. But divers others of the Justices and Barons were of the contrary opinion. First because the Statute of undecimo Henrici quarti begins with Enquest before the Justices, and so the Act seems to extend to them;

them ; and the Statute mentions Denomination to the Sheriff or Bayliff of the Franchise ; and the Enquisition before the Coroners, is to be of persons within the four next adjacent Villages, to be made by the Bayliffs or Constables of those Villages, as appeareth by the Statute of quarto Edwardi primi, de officio Coronatoris, and Crompton, folio 113. That no challenge shall be to any of the Enquest before the Coroners. Residuum postea. pag. 147.

William Vicount, Say and Seale, *versus* Stephens,
Trin. 4. Car. rot. 602.

Actio de scandalis Magnatum. The Plaintiff declares by the name of *William Vicount, Say and Seale* unus procerum & Magnatum hujus Regni *Angliae*, tam pro Domino Rege, quam pro seipso queritur of the Defendant in custodia *Marescalli* pro eo ; whereas by the Statute of secundo Richardi secundi it was ordained, &c. (reciting the Statute) the Defendant not regarding nor respecting the Statute aforesaid, primo Februarii anno tertio Caroli, at the Parish of Bow in Warda de Cheap London, having communication with Alice Gilbert, a Serbant of the said William Vicount Say and Seale, of him the said Vicount, in the presence and hearing of divers of the Kings Subjects, then and there being ; hæc falsa & scandalosa verba de eodem Vicecomite Say & Seale dixit & publicavit, viz. *Thy Lord* (dictum Comitem innuendo) *is a Traytor*, and *I will prove him* (prædictum Comitem innuendo) *a Traytor*. The Defendant pleaded Not Guilty, and it was found against him, and damages assessed to two thousand pounds ; And it was now moved in arrest of Judgement by Serjeant Crawley and Dr. Calthrop ; First, That this Statute is mis-recited, and then, he founding his Suit for himself and the King, and there being no such Statute, hath failed. And in proof thereof they relied upon the Case of the Lord Cromwell. Coke 4. Rep. fol. 12. where an Action was brought upon this Statute and mis-recited. Nuncia pro mendacia, there the Plaintiff might not have Judgement. And the Case in Plowdens Commentaries, fol. 82. betwixt Partridge, and Strange, and Croker, where an Action was founded upon the Statute of tricesimo secundo Henrici octavi capite nono, of maintenance, where the date of the Statute was mistaken, and there the Plaintiff might not have Judgement ; for the Court did not intend any other Statute than that whereupon he counts, and hath mistaken, and being upon that, the Court will not adjudge for him ; and here is a mis-recitall, for he recites the Statute which is, That none shall report or publish de Magnatibus aliqua nova mendacia, seu alias res, unde discordia aut aliqua lis (Anglice debates) inter Magnates, vel inter Magnates & Communitatem dicti Regni oriri possint, whereas the Statute is, whereof discord or slander may arise within the said Realm, so as there is a mis-recitall and variance betwixt the words, debates for slander, which is a variant word ; and the words with

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in the said Realm varies from the words inter Magnates & Communitatem hujus Regni. Secondly, because it is not shewn, That he was unus Magnatum at the time of the speaking of the words, as the President is in the Lord Cromwells Case; For it may be that he was created Viscount or Baron after the speaking of the words, And it shall not be intended, That he was a Viscount before, unless it had been averred, That he was then a Viscount: But the Court resolved in both points for the Plaintiff: For they all agreed, if the mis-recital or variance had been in the purview or substantial part of the Act, as mis-reciting the time of the making, as in Partridges Case, or in the body of the Act, as in the Lord Cromwells Case, Nuncia pro mendacia (which is another word, and of another sense, and in the body of the Act) such variance had been good cause to stay the Judgement; but here they conceived there is not any material variance; for in the first part of the Act is debate *vel discordia*, and in the last part *discordia vel dissension*, which in the intention of the Makers of the Statute be all one: Also it is in the *perclose* unde discordia, &c. which is but the consequence of the words, or the evil effect ensuing thereupon; and false words and lyes are principally prohibited in that Statute. And the second variance is of the same condition, not material in substance; wherefore for such the Court shall not stay Judgement. For the second exception, all the Court held the declaration to be good enough; for there is sufficient demonstration in the declaration, That he was a Viscount at the time of the speaking, for he nameth himself Viscount, and recites the Statute, and that the Defendant not regarding the Statute, spake those words of the said William Viscount Say and Seale; and it cannot be spoken against the said William Viscount, unless he had been then a Viscount; and the Law doth not intend, That he was a Viscount of another Realm, for of them our Law doth not take any cognisance. And whereas it was objected, That there were not any Viscounts in King Richard the seconds time, so as the Statute cannot extend unto them: It was answered, True it is, there were not then any Viscounts; For in the eighteenth year of King Henry the sixth, was the first Viscount, and in the one and twentieth year of the said King, was the question for their seats in Parliament: Yet the Statute is de Magnatibus Regni Anglie, and every Viscount is a Baron, which is an addition of honour. By another reason it appears, That he was then a Viscount; For the speaking is alledged to be, to such a Servant of the said William Viscount Say and Seale, and he cannot be Servant to a Viscount, unless he were then a Viscount; also the words themselves are, Thy Lord is a Traytor; which prove, That he was a Lord at the time of the speaking; And when he names himself Viscount in so many places, To aberr afterwards that he was a Viscount, had been idle and superfluous: But where a Justice of peace or other officer brings an Action for slanderous words spoken

words spoken of him in his office or place, there of necessity he ought to shew, That he was then a Justice of Peace, or such an Officer wherein he was slandered; yet if he shews that which *tantum* amount, it sufficeth; as that he had been a Justice of Peace for divers years, or for two years, and the speaking is alledged to be within the year, that is sufficient; yet it may be that the Commission is renewed; but it shall not be intended; Whereupon Judgement was given for the Plaintiff. Vide postea pag. 142.

Baylye *versus* Offord, Trin. 4. Car. rot. 738.

DEbr, for forty shillings and six pence, and declares, That Sir Henry Brown by Indenture let to J. S. for two hundred years, rendring thirty one shillings per annum, at the Annuntiation and St. Michael by equal portions, and conveys the reversion to him as Assignee, and for fifteen shillings six pence for rent behind for one year, ending at the Annuntiation last past, and for twenty five shillings for money lent, he brings this Action; The Defendant pleaded quoad the twenty five shillings non deber, and quoad the fifteen shillings six pence, That the said Sir Henry Brown demised the said lands, rendring rent prout, and by the same Indenture covenants for himself, his heirs and Assignes, with the Lessee his Executors and Assignes, That if he be disturbed for respite of Homage, or be enforced to pay any charge or issues lost, That he shall withhold so much of his rent, as he shall be enforced to pay; And shews, That by a Writ issuing out of the Exchequer for respite of Homage and Issues lost, so much was levied by the Sheriff, which he hath withheld of his said rent; And upon this Plea it was demurred in Law, and the principal question was, Whether the Assignee of a Term shall have remedy upon a Covenant by way of Retainer, against the Assignee of a reversion? Secondly, because the Defendant doth not shew, That the land was held in capite, or that Homage was due, or the Issues duly levied; And after these matters moved at the Bar, Whistler for the Defendant argued, That the Assignee should have the benefit of this Covenant by the Common-law, and if not, That he was clearly within the Statute of tricesimo secundo Henrici octavi; And for the other matter, the Plea is good; for if he be distrained or agrieved for the Homage or Issues, he may detain his rent; but then he took exception to the Declaration, for that the Plaintiff demanded fifteen shillings six pence for rent, for a year, ending at the Annuntiation, and the entire rent was one and thirty shillings; so that what he demanded was but rent for half a year, and he doth not shew that he was satisfied for the residue; and therefore the Declaration ill. Which was held by the Court to be an incurable default: Whereupon the Record being viewed, and found so, rule was given, That Judgement should be for the Defendant; That the bill should abate; and no more was spoken at the Bar, But the Court conceived

conceived, That the Assignée of the Term should have the benefit of this Covenant. For it runs with the land; and at the Common Law he might have taken advantage to detain the rent reserved upon the Lease for years; For it may be appointed to cease at the will of the parties.

Crane versus Holland, Pasch. 4. Car. rot. 294.

12. **E**Rror of a Judgement in Northampton, because in Northampton the Court being held before the Mayor and two Bayliffs, the Venire facias upon the Issue was awarded to the two Bayliffs, to return a Jury before the Mayor and Bayliffs, secundum consuetudinem: Which being returned, and Judgement given, the Error assigned was, Because the Bayliffs being Judges of the Court, could not also be Officers, to whom process should be directed; there being no custom that can maintain any to be both Officer and Judge. But all the Court (absente Hide) conceived it might be good by custom, and that it is not any Error; For the Judges be not the Bayliffs only, but the Mayor and Bayliffs: And it is a common course in many of the ancient Corporations where the Bayliffs are Judges, or the Mayor and they be Judges; yet in respect of executing process, they be the Officers also; and one may be Judge and Officer diversis respectibus, as in redidestis, the Sheriff is Judge and Officer; Whereupon the Judgement was affirmed.

Skevill versus Avery.

13. **T**Respass of Assault, Battery, and Wounding, The Defendant pleaded to the Wounding Not Guilty; To the Assault and Battery he pleaded, that he was possessed of an House in such a Parish for years, And that the Plaintiff entered his House, and would have thrust him out of possession thereof, whereupon he movetur manus imposuit, to put him out, and the harm, if any done, was in defence of his own possession: Whereupon the Plaintiff demurred; and Goldsmith for the Plaintiff shewed for cause, That the Defendant had pleaded a Lease for years, not shewing who made the Lease, nor when it was made, nor for how many years, whereas they ought to have been pleaded specially, and shewn particulatim: For if it be traversed, there cannot be any Issue thereupon; and he relied upon Crogers Case, Coke 8. Rep. fol. 66. That de injuria sua propria is no Plea: But all the Court held, That the Defendant had well pleaded; for saying, That he was possessed for years, is but an inducement and conveyance to his justification, and not the substance thereof, which is, That he offered to thrust him out of the possession of his House, and whatsoever Title he hath, it is not material; for if he were in possession by virtue of a Lease at Will, or any other Title, de injuria sua propria is a good Plea: For the Title or Interest not coming in question (and

(and what was pleaded or alledged, being but an inducement to the Plea) it needs not be so certain, as where it is pleaded by way of title, to make a claim in the Defendant. Whereupon it was adjudged for the Defendant.

..... Trin. 4. Car. Rot. 770.

Assumpfit. Whereas the Defendant had a dog which used to kill sheep, and knowing thereof, and that his dog had killed the Plaintiff's sheep, and having notice that the Plaintiff intended to sue him for recompence, he thereupon intreated the Plaintiff not to sue him, and to make what benefit he could of the sheep so killed: And in consideration that the Plaintiff would desist his Suit, and make such benefit as he might of the said sheep, the Defendant, the first day of May anno decimo octavo Jacobi Regis, promised the Plaintiff to recompence him the damages which he sustained by the killing of the said sheep: And alledged in fact, That he thereupon desisted from his intended Suit, and that he endeavoured to make what benefit he could of the sheep so killed, but could not make any; And that he was damaged by the killing of them four and forty shillings. And that upon the first day of May anno secundo Caroli Regis, he requested the Defendant to recompence him for his damages sustained, and the Defendant refused; whereupon he brought this Action: The Defendant pleaded the Statute of vicesimo primo Jacobi, capite 16. And that this Action lies not by the said Statute, being grounded upon a promise made above six years since; whereupon the Plaintiff demurred. And after argument at the Barr by Rolls for the Plaintiff, and by for the Defendant, it was adjudged, That the Action was well brought within the time limited: For although the promise was made in anno decimo octavo Jacobi Regis, yet there was not any cause of breach thereof, nor ground of Action against the Defendant until request to make recompence: For until such request, he did not know what to pay, nor was there any due; For the duty ariseth upon the request, and the non-payment after the request is the cause of the Action. As assumpfit to pay such a sum, if he marry A. S. or upon such persons return from Rome upon request; there it is not due, nor is there cause of Action, until the Marriage, or return from Rome, and the request made. And although the promise was made ten years before, yet the cause of Action is the non-payment upon request, after Marriage, or return from Rome, and not before: And if the Action be brought within the time of the Statute after the breach, it is well enough; Whereupon it was adjudged for the Plaintiff.

Lewknor *versus* Cruchley and his Wife, Pasch. 4. Caroli.

15. **A**ction for words spoken by the Wife of Cruchley. For that the Defendant said of the Plaintiff, John Lewknor (innuendo the Plaintiff) and John Smith (innuendo one John Smith) Knowing that *J. S.* a Goldsmith did carry with him a great deal of Plate, did lay wait to robb him, and set upon him by the high way, but he raising the Country, they did fly away, and *Lewknor* lost his horse, and they both were driven to ride away upon one horse. Upon Not guilty pleaded, and Verdict for the Plaintiff, it was moved in arrest of Judgement by Gardiner, That an Action lies not for these words: For it appears by his own shewing, That there was not any Felony committed; and she doth not charge him with Felony, but with a Misdemeanour, as it were a Riot, and is no more than if she had charged him with committing a Riot; and it is but with an intent to do it; and therefore for these words an Action lies not, Coke 4. Rep. fol. 16. Eaton and Allens Case, for saying, He is a Brabler and a Quarreller, for he gave his Champion counsel to make a Deed of gift of his goods to kill me, and then to fly out of the Countrey, but God preserved me; It was adjudged that the Action lies not; For he did not do any Act, but it is matter of intent which cannot be known; But all the Court delibered their opinions seriatim, That the Action well lies: For although he chargeth him with an act which is not Felony, yet he chargeth him not only with the intention, but with a fact, which is as nêr to felony as may be, and is such an offence which is more than intent only, and more than riot, and for which, Fine and Imprisonment are due: And Jones cited one Wicks Case, That the Defendant said, Nine persons set upon me to have robbed me, and you (innuendo the Plaintiff Wicks) was one of them, adjudged, That the Action well lay; Whereupon Judgement was given for the Plaintiff.

Lawe *versus* Harwood, Mich. 3. Caroli rot. 336.

16. **E**rror of a Judgement in Windfore, in an Action upon the Case for standing his Title. The Plaintiff declares, whereas he was seised in fee as Copyholder of Lands in D. within the jurisdiction of the Defendants Court, That the Defendant said, He had not any Title to those Lands. The Defendant justifies, and issue thereupon, and found against the Defendant, and damages assessed to ten shillings, and six pence costs: And the Court increased the costs to three pounds, and Judgement given accordingly. The first Error assigned was, That the declaration was not good, because he did not shew, That by the occasion of those words he had any prejudice, as that he was bargaining for the Inheritance with any, or for a Lease, or any other special prejudice. The second Error was, because damages being found but at ten shillings, he

he might not by the Statute of vicesimo primo Jacobi, capite decimo sexto, have more costs than damages. As to the first Error assigned, all the Court agreed, That the declaration was not good, and so the Judgement was erroneous ; because the Action is not maintainable, without shewing special prejudice. No more than for calling one Whore or Bastard without shewing special cause of temporal damages, as in Anne Davies Case, Lord Coke 4.rep.fol. 16. And it is not like to words spoken, which imply slander and temporal loss, as Thief, Bankrupt, or such like ; but standing of ones Title doth not import in it self loss, without shewing particularly the cause of loss, by reason of the speaking the words, as that he could not sell or let the said Lands ; but being general words, they be not sufficient, Vide Coke 4.Rep.fol. 17. James his case, and fol. 18. Oxford and his Wife against Cross. To the second Error assigned, all (except Hide, who seemed to doubt thereof) held, That the Action is out of the Statute of vicesimo primo Jacobi, as well for the time of limitation, as for the costs ; for that extends to Actions for slanderous words, which he intended to the persons of men, and are common Actions, and rather begin of spleen than otherwise ; but not to this Action, which is rare, and not brought without special damage. But for the first cause the Judgement was reversed.

Hughs *versus* Farrer.

Action for words. Thou art a Witch, and didst bewitch my Mothers drink : And being afterwards desired to know, why she called her Witch, she answered, If I called her Witch, we will prove her a Witch, and answer what we have done. Upon Not Guilty pleaded, and Verdict for the Plaintiff, it was moved in arrest of Judgement, That for these words an Action lies not, because they were general words, and shew not any special hurt to the drink : So not within the Statute of primo Jacobi, capite duodecimo, if there be no hurt to the persons or goods : But all the Justices besides Whiclock conceived, That the Action well lies ; And it was adjudged for the Plaintiff. 17.

The Lady Cavendish *versus* Middleton, Trin. 4. Car. ror. 243.

Action upon the Case. Whereas the said Lady by Ralph Buck her Servant, having bought of the Defendant twelve Beasts for fourscore pounds, paying for them twenty pounds in hand, and was to pay sixty pounds residue at the end of the Month, which twenty pounds the said Ralph Buck immediately paid, and the sixty pounds residue he paid for the Plaintiff to the Defendant at the end of the Month, and after dyed. That the Defendant, after the said Bucks death, demanded of the Plaintiff again the said sixty pounds, affirming it was not paid unto him : Whereupon the Plaintiff 18

Plaintiff fidem adhibens to his assertion, paid unto him the said sixty pounds, ubi re vera he had received it before. And upon this deceit the Action was brought; and Serjeant Crew moved in arrest of Judgement (after Verdict upon Not Guilty pleaded, and found for the Plaintiff) That this Action lies not; but she ought to have brought an Action of account, as for money unduly received: But all the Court conceived, That the Action well lies, although the Plaintiff might have brought an Action of account; Whereupon it was adjudged for the Plaintiff.

Viscount Say and Seal *versus* Stephens, ante pag. 135.

19.

The said Viscount having had Judgement to recover, a Writ of Error was brought to remove the Record into the Exchequer-Chamber, upon the Statute of vicesimo septimo Elizabethæ, capite quinto, which gives Writ of Error upon a Judgement given in Actions upon the Case, Debt, Detinue, Account, Ejectione firmæ, or Trespass, first commenced there where the Kings Majesty shall not be a party. It was moved, That the Writ of Error is not allowable, because it is given in seven several Actions there enumerated, and is not allowable in any other Action, as in Replevin, Scire facias, &c. And although it be here termed an Action upon the Case, yet it is more than an Action upon the Case, for it is in a far higher degree, and founded upon the Statute of secundo Richardi secundi, and is for the King and party; and of that opinion were Chief-Justice, Jones and Whillock, That this Action is out of the Statute; For the Statute is to be intended in Actions upon the Case, and not in other Actions, nor to this Action, which is Scandalum Magnatum, and grounded especially upon the Statute. And the Statute of vicesimo septimo Elizabethæ being to alter the course of the common-Law, ought not to be extended to other Actions then what are mentioned in the Statute: And it was said, That after the said Statute, no Writ of Error hath been brought upon such Actions: And it is intendable, That if a Writ of Error might have been brought, it would have been practised before these times: But the other objection, That it was brought by the King and the Party, was not much regarded; for so are Actions upon the Case for the King and the Party, and debt for not setting out Cythes; yet it is a common course upon those Actions to have Writs of Error in the Exchequer-chamber: And it was said, That if the Lords in Parliament had intended, that this should be examined by a Writ of Error any where but only in Parliament; they peradventure would not have agreed unto it. But I doubted thereof, and delivered not any opinion; for I conceived it more proper to have it disputed in the Exchequer-chamber, when the Writ of Error shall be returned, as it hath been in other Cases, where

where a Writ of Error hath been brought upon a Scire facias, and been adjudged there, That it lies not : Then for us to dispute it, being a matter of our own judging.

Long *versus* Nethercote, Trin. 4. Car. rot. 43.

ERror of a Judgement in Sudbury, in debt upon a Lease for years, by the Assignee of a Reversion. The first Error assigned was ; For that the Court is held by virtue of letters Patens of Queen Mary, and the process is awarded secundum consuetudinem Curie, which cannot be by custome, where the Court is erected within time of memory. The second Error assigned, was, Because the Action of Debt is brought supposing a demise in Sudbury, of Lands in D. in the County of Essex, whereas it ought to be brought in Essex, being brought upon the privity of Estate, and not upon the Contract, the Plaintiff being Assignee of the Reversion ; For where the Action is brought by the Lessor upon the privity of Contract, it was said, the Action might be brought where the demise was made, although the Land be in another County, and is well enough : But where the Action is brought by one as Assignee of a Reversion, it ought to be brought in the County where the Land lies, and not where the demise was made. The third Error assigned was, Because he claims by grant of a Reversion, and doth not shew, That it was by Dæd ; and without a Dæd or Fine a Reversion cannot pass. And for the first and third Errors principally, the Judgement (not being upon Verdict but upon demurrer) was reversed.

20.

Darrose *versus* Newbott.

ERror of a Judgement in Bridgwater. The Error assigned was ; For that in an Action upon the Case *sur* Assumpsit, the parties being at Issue, a demurrer was joyned upon the evidence, and thereupon the Jury discharged, and afterwards Judgement was given for the Plaintiff, and a Writ of Enquiry of damages awarded, and damages found, and Judgement thereupon. Where the Jurors which came to find the Issue, although by the demurrer they were discharged of the Issue, yet ought to have assessed damages conditionally, if Judgement should be given for the Plaintiff : And in proof thereof was cited Scholasticas Case, in Plowd. Comm. fol. 408. and the old book of Entries fol. 146. in Demurrer 12. & 13. & ibidem 237. *Forger de faux faits* 11. And it was said by the Court, if these precedents be good Law, then it may be inquired of by the same Jury conditionally : But it may be as well enquired of by a Writ of Enquiry of damages, when the Demurrer is determined, and the most usual course is, when there is a Demurrer upon evidence to discharge the Jury without more enquiry, Vide old book of Entries fol. 551. *Trespas in Arser* 1.

21.

Sir

Sir Humphry Tufton and Sir John Ashleys Case.

22. **I**N a quo warranto against the Corporation of Maydstone, for claiming divers Liberties in the Village and Parish of Maydstone (in which Parish one house called the Mote, wherein Sir Humphry Tufton inhabited, and a great house called the Arch-bishops Palace, which was conveyed to Sir John Ashley were situated) a Judgement was entred by disclaymer, with consent of the parties, *virtute vel prætextu literarum Patentium*, gerent. date, anno decimo septimo Jacobi Regis. But because these words Gerent. date, anno decimo septimo Jacobi were in the Bargent, and by reason of a stroak made cross the said words, the Clerk had omitted them in the ingrossing the Judgement (which was entred upon Record anno secundo Caroli Regis.) It was now moved this Term, That those words might be interlined, and the Record amended; but it was much opposed by Sir Humphry Tufton and Sir John Ashley whom the Cause concerned, by Serjeant Henden and Br. Noy, who were of Counsel for them: For they said, That albeit it is true, that they were omitted by the negligence of the Clerk, and the Paper-book was fair, without interlineation or crossing, yet it cannot be amended, being in another Term, much more in another year, especial in the Kings Case; and that none of the Statutes of amendments extend to Cases of quo warranto, or Suits where the King is party; and that the amendment will alter the Record in substance; For whereas their Suit was to be freed from those Liberties by *monstrans* of any Charters: Now by this amendment they be freed only from Liberties claimed by the Charter of decimo septimo Jacobi, whereas there were other Charters pretended, viz. in anno secundo Elizabethæ, from which they desired to be freed. But upon great examination of this omission, and upon certificate of the Attorney-General, That these words omitted, viz. Gerent. date, anno decimo septimo Jacobi, were inserted by him with his hand, and written in the Bargent of the Paper-book in the side of the book, and that it was intended by the parties, That this disclaimer should not extend further, than to liberties granted by the Charter of decimo septimo Jacobi, and not to liberties granted by former Charters, and that the stroak which was made cross the said lines was uncertain, whether voluntarily done; or when done. And upon examination of divers Witnesses, That such was the agreement, it was held by all the Court, to be amendable, by the course of the Common-law, as well in another Term, as in the Term when it was entred, and as well in the Kings Case, as of a common person: And being merely a misprision of the Clerk, by the misguiding of the Paper-book by the examination of all the circumstances, it is no more than when
a special

a special verdict is mis-entred, which is rectified by the notes of the Clerk of the Assise; whereupon it was awarded to be amended, and was amended accordingly.

Kendal *versus* Fox.

23.

Ejectione firmæ. Upon a special verdict the Case was, That Nicholas Kendall and Lowda his Wife, being jointly seised by purchase during the Coverture for their lives, Remainder to Walter their eldest Son in tail, Remainder to William their Son in tail, Remainder to the right Heirs of Nicholas: Afterward Nicholas by deed with Letter of Attorney, infeoffs the said William and his Wife, and the Heirs of the body of William, Remainder to the right Heirs of the said Nicholas, with warranty against all persons; and after levies a Fine to two Strangers of the same land to them and their Heirs, with warranty against all persons; and they render it to him for a Week, Remainder to the said William and his Wife, and to the Heirs of the body of William, Remainder to the right Heirs of Nicholas; afterward Nicholas dyes, Lowda the Wife enters and dyes, Walter the eldest Son enters, William and his Wife enters, and lets to the Plaintiff: The principal question was, Whether this warranty made by Nicholas upon the feofment, being a collateral warranty, and descending upon Walter the eldest Son, be totally avoided by the entry of Lowda? And whether the Remitter of the Feme be also a Remitter to Walter, and the warranty discharged? And it was held, That it was not; For the warranty being descended, and attached before the entry of the Feme, although she be free and not bound by the warranty, yet he in Remainder being bound, that *Estops* the Remitter, Vid. 44. Ass. 35. 44. Ed. 3. 30. and upon the first argument by Maynard for the Plaintiff and Calchrop for the Defendant, it was adjudged for the Plaintiff.

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24.

Error of a Judgement in a Quare Impedit for the Church of Leckhamsted, and therein the Judgement being for the Plaintiff, and the value of the Church found to be fourscore pounds per annum, a Writ of Error being brought of the Judgement before the Exigifacias, and after the Record removed; And the Judgement being affirmed, and having depended a year and more, it was moved that according to the Statute of tertio Henrici septimi, capite decimo, which appoints damages and costs and to be allowed where Writs of Error be brought pro delatione Executionis: The Court here awarded, That the Defendant in the Writ of Error should have damages for a year (during which time the Writ of Error was depending) according to the value of the Church found by the verdict, which was 80. l. per annum, and they awarded him 80. l. besides costs according to the president in anno sexto Edwardi sexti, Dyer. 77.

©

Roylons

Roysons Case.

25. **R**Oyson, Because he offered himself to be bayl in an Action before Justice Whitlock (and upon his oath affirming himself to be a Subsidie man, and to be assessed four pound goods in the Subsidie book: Being further examined what he paid, and other questions, and confessing that he was not any Subsidie man) was by him committed, and the next day brought by the Marshal into the Kings Bench, and being examined of this misdemeanour, submitted himself to the grace of the Court, and confessed that he had been Bayl in other Actions, and had sworn that he was a Subsidie-man, whereas he now confessed in Court, That he was not: For this cause he was presently adjudged to be committed to prison, and to stand upon the Pillory, with a paper mentioning his Cause, viz. For false Bayl, and to be brought to the Court of Kings Bench, Common-pleas and Exchequer: And this upon his confession was recorded in Court, without other proceedings against him.

Green versus Guy.

26. **I**Nformation for the King and himself before the Justices of Assise in the County of Essex, upon the Statute of 21. Hen. 8. cap. 13. for non-residency for eleven Moneths upon his Church of parva Thurrock in the County of Essex; The Defendant pleaded the said Statute of 21. Hen. 8. cap. 13. That one who hath two Benefices shall be Resident upon the one, and that he was lawfully presented, instituted, and inducted, as well to the Vicaridge of Egware in the County of Middlesex, as to the Rectory of parva Thurrock, and that he was all the time in the Information mentioned Resident upon his said Vicaridge of Egware; and it was thereupon demurred, and the cause of demurrer was by Henden Serjeant alledged to be, For that he did not shew a dispensation, as Coke 4. Rep. fol. 119. Boytons Case cited there; but to that point no resolution was given: For in regard this Information was brought before the Justices of Assise and Oyer and Terminer, and the Statute doth not give it, but only in the Kings Courts, where there may be *Essoigne Gager del ley or protection*; Therefore notwithstanding the Statute of vicesimo primo Jacobi, capite which appoints, That Informations taken by Enquest, before Justices of Assise, or of Oyer and Terminer, shall be determinable there. It was resolved upon conference with the other Justices, That this Information lyeth not before them; And Judgement was given for the Defendant. Vid. Coke 6. Rep. fol. 19. Gregories Case, and 6. & 7. Eliz. Dyer. 236.

Termino Hillarii, anno quarto *Caroli* Regis,
in Banco Regis.

Sir William Withipoles Case, ante fol. 134.

THE first day of this Term Sir William Withipole was arraigned upon an Endicament of Murder, found in this Narration in Suffolk, before Commissioners of Oyer and Terminer, and certified hither by Cerciorare. and upon his arraignment he desired to have Counsel to plead for him Ore tenus, pretending he had matter in Law to plead; but the Court denyed it, unless he would shew unto them some exception in Law, for which they should see cause to appoint him Counsel; and then Mr. Holborn should be assigned for him (as the Court said any other might be, though not assigned.) Afterwards the said Mr. Holborn (being assigned his Counsel) moved, That he ought not to be arraigned upon this Endicament, because he had been *autor solus* arraigned upon an Enquisition of Murder, found before the Coroner, and had pleaded thereto, &c. and so concluded his plea, by pleading Not guilty to the Felony. But it was held by all the Court, That this was no cause of plea; for where he is not convicted or acquitted, he may be arraigned upon a new Endicament: But to avoid that doubt, that he should not be questioned upon both, it was ruled, That the first should be quashed as insufficient; Then it was moved by Holborn, That one of those Endicaments was outlawed in trespass. But because he had not the Record ready, and the Court conceiving it to be alledged by him in delay of Justice only; Therefore the Court ordered him to answer; And he pleading Not guilty, they commanded to have a sufficient Jury to try him returnable Octabis Purificationis.

Forger *versus* Sales.

DEbe upon an obligation against the Defendant for an hundred pounds, as Son and Heir of William Sales, and declares, That William Sales, by his obligation here shewn, had obliged himself in two hundred pounds, &c. and omitted these words, which were in the obligation (Et ad eandem solutionem faciendum obligo me & Heredes meos) the Defendant pleaded *Riens per descent*, and it was found against him, and now moved in arrest of Judgment,

ment, That those words being omitted, it doth not appear the Pleir was bound : But it was prayed on the other part, That it might be amended, because it was the meer default of the Clerk, who having the obligation before him, omitted those words, and the Clerk, being examined, confessed, That he had the obligation and instructions to draw it against the Defendant as Pleir, and that it was a mere misprision of himself ; but Jones conceived it not amendable, because it is the substance of the declaration ; as where one declares in the Debet and Detinet, where it ought to be in the Detinet only, as vicesimo secundo Edwardi quarti, folio vicesimo primo, it is not amendable ; But my self and Whiclock conceived it to be amendable, it being merely the default of the Clerk, when he had the obligation before him : And the Action is brought against him as Pleir, and so he is termed in the obligation it self, and it is merely the omission of the Clerk, which is well amendable : And Hide chief Justice inclined to this opinion ; but to avoid further question, it was appointed to be amended by consent, and that the Defendant should plead de novo.

Audley versus Halsey, Hill. 3. Caroli rot. 943.

3. **A**ction *sur Trover* of Goods, on the twenty fifth day of November anno tertio Caroli : Upon Not guilty, a special verdict was found, That one John Hill and Alice Squire were possessed of those goods, and used the Trade of Merchandize, and being so possessed, were bound to the Defendant, anno vicesimo primo Jacobi, in a Statute, acknowledged according to the Statute of vicesimo tertio Henrici octavi, capite sexto, for a true and just debt, and that being forfeited, he sued an Extent upon that Statute, tricesimo Octobris tertio Caroli, directed to the Sheriffs of London, and that they, by virtue of that Extent, tricesimo primo Octobris tertio Caroli, extended those goods (the Writ being returnable in Crastino Animarum) and returned the Writ and Enquisition into the Chancery, That the third of November, tertio Caroli, the said John Hill and Alice Squire became Bankrupts, being indebted to the Plaintiff, and to divers others for true and just debts. That upon the first day of November tertio Caroli, the Defendant sued a Liberate upon that Extent, and those goods the same day were delivered by the Sheriffs according to the appraisement in the Extent, That afterward, viz. upon the eighth day of November, the Plaintiff and others sued out the Commission of Bankrupts, against the said Hill and Squire, and the Commissioners, by virtue of their Commission, sold those goods to the Plaintiff upon the three and twentieth day of November tertio Caroli, and that the Defendants afterward, viz. the twenty fifth day of November the same year, converted them, &c. Et si super totam, &c. And it was argued several dayes at the Bar, and the sole question was, Whether John Hill and Alice Squire becoming Bankrupts after the Extent, and before the Liberate, the sale

sale of the Commissioners unto the Plaintiff, after the goods delivered upon the Liberate, be good? And it was argued by Noy and Farrer for the Plaintiff, That this sale is good; For notwithstanding this Extent, the property of the goods remain in the Conufors, and by the Extent are only seised into the Kings hands, but that shall not divest any property from the Conufors; for they be but as it were in protection of the King, and then, when the Conufors become bankrupts before the Liberate, those goods are in the power of the Commissioners to sell and distribute amongst the Creditors; And they relied especially upon the book of tertio Edvardi sexti, Dyer 67. where goods being extended, yet were subject to be seised for the Kings debt: And they also relied upon the Statute of decimo tertio Elizabethæ, capite septimo, and chiefly upon the Statute of vicesimo primo Jacobi, cap. whereby is proved, That the Commissioners may sell goods or lands, notwithstanding Judgements, Statutes, Executions, or Extents, not served or executed, and that they said was not done untill the Liberate, otherwise there would be a mischief: For then there may be an Extent, and no Liberate be sued after upon it, as the book of tricesimo primo Henrici sexti, Brooke Statute 41. But all the Court resolved, and severally delivered their opinions, That those goods, extended before they became Bankrupts, and delivered by the Liberate after they became Bankrupts, could not be sold by the Commissioners, because they being extended, are quasi in Custodia Legis, so as the Conufors have not any power to give, sell, or dispose of them; and although by the Extent the Conufee hath no absolute interest nor property in them, untill the delivery by the Liberate, and at the return of the Writ, may refuse them for being over valued, yet that is for advantage of the Conufee: For the Extent is Capias in Manus nostras, ut eas liberari facias, and they be as goods gaged or distrained, which cannot be forfeited by outlawry, or taken in execution from the party who hath them in gage, or by way of distress, without payment of the money, Vide tricesimo septimo Henrici sexti, folio decimo; vicesimo secundo Edvardi quarti, folio undecimo; tricesimo quarto Henrici octavi, Brook pledges 28. and decimo tertio Richardi secundi, Brook pledges: For the goods are bound by the Teste of the Writ of Extent or Execution sued, as secundo Henrici quarti, folio decimo quarto; quarto Henrici sexti, folio quinquagesimo octavo, and Coke 8. Rep. fol. 171. the goods are bound by the execution suing, but the land is bound by the Judgement, and by the Extent they are to be taken by the Conufee, and it is good against the Conufor: And the Case here is stronger, for that the Extent is returned before they became Bankrupts, and the delivery by the Liberate was before the Commission of Bankrupts was sued out; and it is not like unto the Case of tertio Edvardi sexti, Dyer 67. For there although the goods were extended, yet they were not delivered to the Conufee, and the Writ was not returned; and the Writ of privilege was for debt due to the King, wherein the King hath his prerogative

rogative by the Common-law: And yet it is said there, That others were of a contrary opinion: Also when the Writ of Liberate is sued, it hath relation to the Writ of Extent, and they be quasi but one Extent; and the Goods are so bound by the Extent and Apprizement, that the Conusor hath not any more property in them, but secundum quid, and not simpliciter; that is, if the Conusor refuse to accept them; for it is a conditional Writ to deliver them to the Conusee, if he will accept them, and when he accepts them, they are bound ab initio. And Jones cited a Case, anno decimo nono Jacobi in the Common-Bench, betwixt Brumsted and Bathurst, where an under-Sheriff took an obligation for his fees, for an Extent serving before the Liberate: It was held not allowable, but he ought to have stayed untill the Liberate. And whereas it was objected, That the Writ is not served nor executed untill delivery of the goods upon the Liberate, and therefore the Commissioners had power of them, They all conceived, That the Statute being with an exception, Where Execution or Extent is served or executed, That this is to be accounted the executing of an Extent, when the goods be appized, and the Writ returned; but so long as they remain in the hands of the Conusors, they may be sold; but when they are delivered by the Liberate, the Commissioners have no power to meddle with them. And it was said, That the Statute of vicesimo primo Jacobi provides, That goods attached by foreign Attachment in London, shall be sold by Commissioners, which proves, That after the Statute of decimo tertio Elizabethæ, untill the Statute of vicesimo primo Jacobi, the Commissioners had no power to meddle with goods taken upon a foreign Attachment, yet they are but as a Pledge to draw the party to answer; and if he appear, the foreign Attachment is discharged; Wherefore this Extent being returned served, the goods be not subject to other Executions, nor to the power of the Commissioners; And it was therefore adjudged for the Defendant.

Bach *versus* Gilbert.

4. **E**RROR upon a Judgement in the common-Bench in an Ejectione firmæ. The Error assigned; For that Jane Herlakenden apud D. demised an house and forty acres of land in D. per nomina omnium messuagiorum terrarum & tenementorum suorum in Parochia de D. seu alibi in comitat. Kanc. Upon Not Guilty pleaded, the Plaintiff surmised, That the said Parish of D. is in Rumney within one of the Cinque Ports, ubi Breve Domini Regis non currit; and that Allington is the next Village adjoining thereto in the County of Kent; and prayed a Venire facias upon it: and thereupon a Venire facias was awarded de vicineto de Allington, and by them it was found for the Plaintiff: And it was now assigned for error, That this Venire facias was mis-awarded, and a Writ of error not aided by the Statute; for the surmise ought to have been, That

That D. is within the Cinque-ports, and not that the Parish of D. is within the Cinque-ports; for D. may be a Village of it self, and the per nomina omnium terrarum, &c. in Parochia de D. may be the same place; But the Court held, That the Vill and Parish are intended all one, unless the contrary be shewn, and that it is no error; Wherefore rule was given, That the Judgement should be affirmed.

Jenks *versus*

DEbt upon an obligation against the Defendant as Brother and Heir to J. S. The Defendant pleaded *Riens per discens* from his said Brother, and issue being thereupon, a special verdict was found, That the Obligor was seised in fee of such lands, and had Issue, and dyed seised, and the Issue dyed without Issue, whereupon the lands descended to the Defendant, as Heir to the Son of his Brother, Et si super totam, &c. And after argument, it was adjudged for the Defendant: For although he is chargeable as Heir upon this bond, yet he is but a collateral Heir, and it ought to be specially declared, and the Issue ought to be joyned accordingly; but upon this Issue it is found against the Plaintiff; for he hath nothing as immediate Heir to his Brother, but by descent from the Son of his Brother; and if he would charge him, he ought to have made a special declaration; Wherefore it was adjudged for the Defendant.

5.

Termino Paschæ, anno quinto *Caroli* Regis,
in Banco Regis.

James Hyott *versus* Hoxton & Broughton.



ER R O R in Banco Regis. Upon a Judgement in
Audita Querela in the Common-pleas by Hoxton
and Broughton surmising, whereas they were
bound in a Statute, acknowledged before the
Mayor of Hereford to Hyott, and he sued Exe-
cution upon that Statute, and thereupon the
said Hoxton was taken, and let at large by the
Sheriff of Salop, with the assent of the said Hyott, whereby they
were to be discharged of any other Execution against them; That
notwithstanding the said Hyott to vex the said Hoxton and
Broughton minus juste, by virtue of an Inquisition found before the
Sheriff of Salop, and the Sheriff of Hereford, such a day and
year, the Lands and Goods mentioned in the Inquisition eidem
Jacobus deliveravit, where it ought to have been by the two Sheriffs
deliberari procuravit, otherwise it is insensible that the Plaintiff
should deliver to himself. And this was assigned for Error, That
the declaration was insufficient, it not appearing that the said
Goods and Lands so extended, were delivered by any Sheriff, but
by the party himself, and so much the rather, because the Judge-
ment being, That they shall be restored to what they lost, it doth
not appear what they lost, nor what was delivered in execution:
But all the Court conceived it to be no error; for the Writ is good
enough, which shews sufficient cause of discharge: And com-
prehending that he is minus juste grieved, by delivery of their Lands
in extent, it is sufficient without other declaration: And when the
declaration is good in point of the cause of discharge; although the
matter be ill in point of aggravation of damages, yet the Writ be-
ing good, and the Issue taken upon the cause of discharge, and found
for him, the Judgement is good: For the default in the declaration
is not material and to that objection, that being uncertain, it cannot
be referred to enquire what was lost or taken in execution. That
may very well be supplied by the Writ of Enquiry of what dama-
ges, &c. And so this Writ being found, he may be restored; Where-
upon the Judgement was affirmed, Coke book of Entries fol. 234.

Beare *versus* Woodley.

2. **A**Vowry. Upon demurrer, the Case was J. S. grants a rent of fourteen pounds per annum out of such Land, *Habendum* seven pounds *per annum* for thirty eight years, if J. D. live so long, payable at Michaelmas and the Annuntiation; and *habendum* the other seven pounds *per annum*, to begin after the death of Woodley for thirty eight years, payable at the said two Feasts; and if it happen that the said rent of fourteen pounds to be behind, That he may distress; And whether this was one entire rent, or several rents was the question? For that it is but one grant of fourteen pounds in the beginning, and the distress is limited for fourteen pounds, so it is entire also in the distress: But all the Court resolved, That they were several rents, because they have several beginnings and several endings; and although it be mentioned to be but one in the clause of distress, yet that is to be intended distributive to each part thereof; Whereupon it was adjudged against the Abowant, Vide 17. Ed. 3. 75. 17. Aff. 10. 14. Eliz. Dyer 308. Coke 5. Rep. fol. 54.

Goshawke *versus* Chiggell.

3. **E**jectione firmæ. Upon a special verdict the Case was, One Crogate was possessed of a Lease for a thousand years of the Tenements in question, and by deed poll granted all his Term, Estate, and Interest therein, to Hester his Daughter, *habendum* to the said Crogate and his Wife for their lives; and after their decease, to the said Hester; and if she hath Heir of her body, then to her Executors and Assignes, provided, That he shall pay to Diana her Sister, after the death of Crogate and his Wife, ten pounds *per annum* during her life; provided also, that if the said Hester died unmarried, having no Issue of her body lawfully begotten, That then this grant to the said Hester should be void, and then Diana should have the Term. It was found that Hester was married, and died without Issue, Crogate and his Wife died, the Plaintiff claims by Lease from the Executors of Hester, and the Defendant claims under Diana, and also by the Executors of Crogate; And whether the Plaintiff claiming as Executor to Hester shall have it, was the question? And it was argued by Griggs for the Plaintiff, and by Popes for the Defendant: And for the Plaintiff was urged, That this is a good grant of the term to Hester, whereby she was interested therein, and the *Habendum* is void; and the second Proviso for the determination thereof is not performed, because she did not die unmarried; and in that point the Proviso is good, and the other part of the Proviso is to no purpose (for she cannot die unmarried and have Issue of her body lawfully begotten) and therefore is to be rejected; wherefore, &c. But all the Court, delivering their opinions seriatim, conceived

conceived the Plaintiff had not any title, but the Defendant had good title; For they agreed, That the grant was good, and the Habendum to the Grantor and his Wife for their lives, and after to Hester is void, because it is repugnant to the Grant; but the Habendum shews the intent of the parties, That the Executors of Hester shall not have it, unless she be married, and hath heirs of her body; and the Proviso (That if she die unmarried having no Issue of her body lawfully begotten, That it shall be void) shall have this construction, That if she die unmarried, or married, having no Issue of her body (for she may not have lawful Issue, unless she be married) then it shall be void; for that is expounded by the Habendum, That he did not intend, That the Executors of Hester should have it, unless that she had Issue; so by this construction the words of the Deed stand together; and when it was found that she was married, and died without Issue, the Estate to Hester and limitation to her Executors is determined; Whereupon rule was given, That Judgement should be entred for the Defendant, unless other matter were shewn, &c.

Wicks *versus* Shepherd, in the Exchequer.

Action for words. Whereas he was of a good fame, and a Sui-
tor to such a woman, to marry her, by which marriage he was
likely to have had a good preferment, and was in possibility to ob-
tain her; That the Defendant maliciously, and to hinder him of
this marriage, used these words to the said woman (in presence of
others) of the Plaintiff, He is a sharking fellow, and getteth his living
by deceit, and used himself violently to his former Wife, and denyed her
necessaries; and is a needy fellow, and his conditions are wicked; and
for his Religion, he is a Brownist: By reason of which words the
said woman refused him, and he lost his marriage. The Defen-
dant pleaded Not guilty, and found against him, and moved in ar-
rest of Judgement, That these words are not actionable: But
after argument, because it was shewn, That by reason of those
words he had lost his marriage, it was held good cause of action,
and adjudged for the Plaintiff; And afterwards Judgement
was affirmed in a Writ of Error in the Exchequer Chamber:
And Sir Nicholas Hide, chief Justice, propounded it to Justice
Jones, Justice Harvie, and my self, Whether this Action was main-
tainable? And we all agreed, That the Action well lies for the loss
which he had by speaking those words, otherwise the words with-
out such circumstances will not maintain an Action, as it is in the
Case of Anne Davies, Coke 4. Rep. fol. 16.

4.

Salvin *versus* Clerk, Hillary 20. Jac. 101. 466.

5. **E**Jectiōe firmæ. Upon a special verdict the Case was, Alexander Sydenham was Tenant in tail to him, and the Heirs Males of his body, the Reversion in fee to John Sydenham his eldest Brother. Alexander makes a Lease for three lives with Warranty against all persons, the Lease not being warranted by the Statute of tricesimo secundo Henrici octavi capite afterwards Alexander, anno decimo sexto Elizabethæ, levies a Fine of those Lands with Warranty against all persons, and with proclamations to Taylor, under whom the Defendant claims, and afterwards dies without Issue Male, having Issue Elizabeth, Mother to Poynts, Lessor of the Plaintiff. After the death of Alexander, the said John, anno tricesimo Elizabethæ, dyed without Issue, the said Elizabeth, being his Niece and Heir, in anno decimo octavo Reginæ Elizabethæ, the Lease for three lives expired, the Defendant entered by virtue of a Lease from Taylor; and Poynts enters as Heir to Elizabeth and lets to the Plaintiff, and the Defendant ousts him &c. This Case was oftentimes argued at the Barr, and afterwards at the Bench, and all the Justices were of opinion, That Judgement should be given for the Defendant. The first Question was, Whether this Warranty in the Fine (admitting that it was not with any proclamations, and no non-claim) should make a discontinuance in Fee, and be a bar to Elizabeth, because it did not descend by the death of Alexander without Issue upon John, who had right of the Reversion, but upon Elizabeth his Daughter? And when John afterwards dyed without Issue, Elizabeth being his Heir, whether she be barred by this Warranty, or whether the Warranty were determined by the death of Alexander? But all the Justices, besides Whiclock (who spake not to that point) conceived, That the Warranty continues, and is a Bar unto her; For by the Estate for life it was discontinued, and Alexander had a new Fee; and then when he by Fine grants that Reversion with Warranty, the Warranty is annexed to the Fee, and binds him that hath the right; For the Reversion being divested and displaced, the Fine and Warranty enures thereupon; and by consequence, although the Warranty did not descend upon John, who had the right of Reversion, but upon Elizabeth, yet when John was dead without Issue, the right descended to Elizabeth, and she is barred by the Fine; and it is not like to Seymors Case, Coke 9. 95. where the Reversion was not displaced, nor a Fee gained, as it is here, Vide vicesimo primo Henrici sexti, folio quinquagesimo secundo; vicesimo secundo Edwardi quarti, tit. discontinuance. The second point was, Whether this Fine and Non-claim for five years shall bar the Daughter? And resolved, it was a bar. For when John who had right at the
time

time of the death of Alexander without Issue Hale, did not prosecute that title, it is a barr, and he shall not have the advantage of entry after the death of the Tenant for life, because he hath no other title after his death than he had before, for his title was by the death of Tenant in tail, without Issue Hale, and then he might have brought his *Formdon*; And when he did not pursue his title after it first vested, he and his heirs, and all claiming by him, shall be barred for ever. And it is not like to the Case where Tenant for life makes a Feoffment, and so commits a forfeiture, and a Fine with Proclamations is levied; the Lessor hath title of Entry in respect of the forfeiture; as also when the Reversion falls in possession by the death of the Tenant for life, and may have election to make his entry within five years after the Reversion falls in possession; but here he hath but one title, viz. after the death of the Tenant without Issue Hale, when he might have brought his Action of *Formdon*, and not to tarry untill the death of the Tenant for life; Whereupon it was adjudged for the Defendant.

Lynnet versus Wood.

Action of *Trover*, for divers loads of Corn. The Defendant pleads and entitles himself unto them as tythes severed, and because the plea amounts but to a Not guilty, the Plaintiff demurred and shewed for cause, That the plea was not therefore good. Henden, Serjeant, would have maintained this plea, because it concerns matter in the Realty, viz. tythes, and title is pleaded, as it were a confession of the possession in the Plaintiff, and as a general bar in action of trespass, and colour given, Sed non allocatur; For this action comprehends title in it, and a plea which amounts but to a general Issue is not allowable, it being specially shewn for cause of demurrer; Whereupon without argument it was adjudged for the Plaintiff. 6.

Ansley versus Chapman, Mich. 3. Car. rot. 842.

Ejectione firmæ of Lands in Totenham. Upon a special verdict the Case was, William Lock was seised in fee of the Tenements in question, and of divers others mentioned in the verdict, and having divers Sons, viz. Thomas, Matthew, John, Henry, and Michael, and being bound in an obligation, That forty pounds, should be paid annually to his Wife during her life, made his Will, and thereby devised all his lands by several clauses to several his Sons; and amongst others, he devised the land in question to Michael and Henry his Sons upon this condition, That if they sell 7.

sell it to any but to Matthew Lock his Son, then he to enter, as of his gift; And adds this clause; *Item* all the houses and lands, which I have given between my Sons, is to this purpose, That they all shall bear part and part-like, going out of all my houses and lands, towards the payment of my Wifes forty pounds *per annum* during her life, which I am bound to pay; and which of my Sons refuse to bear their part, I will, That he or they shall enjoy no part of my bequest given unto them; but my gift given unto them shall go to the rest of my well-willing Sons: And whether upon all this matter Michael and Henry have an Estate in fee by this Will, or for life only, was the sole question? For if it be an Estate for life only, the Plaintiff, who claims under the Heir of Michael Lock, hath no title. And it was argued at the Barr for the Plaintiff, That it was a fee by this devise to Michael Lock. First, because the devise is to the eldest Son, who should have taken a fee by descent, if not by the devise; and he intended every Son should have a fee as well as his eldest. Secondly, by the clause, That they shall not sell unless to Matthew, is intended, That they had an estate of Inheritance, which they might sell, as *seprimo* *Edvardi sexti* Broke devise. Thirdly, because it is devised paying such a sum, viz. every one his part of the forty pounds per annum, to the Wife, which implies, That the Devisor intended they should have an Inheritance; And it was said this very Case was so resolved in the Court of Wards, by the advice of the two chief Justices and the chief Baron, That the intention of the Testator will make it an Inheritance; whereupon by Noy and Germyn Judgement was prayed for the Plaintiff: And it was argued by Fynch Serjeant, and Whisteld for the Defendant, That for as much as there is not one word in the Will which speaks of any express intent, That he should have fee, the Law will not adjudge it to be so, without an intent apparently to be collected out of the words in the Will; and they said, That upon argument in the Exchequer by all the Barons after the said resolution in the Court of Wards, Tanseild chief Baron (who was one of those that gave the said resolution in the Court of Wards) was of opinion, That it was not fee, but for life; And so all the other Barons agreed with him, and they produced the Record thereof under the Seal of that Court: And afterward all the Court here resolved, without open argument, That it was but an Estate for life only that passed by this devise; For as to the first reason, before alledged on the other side, it was answered, That the eldest Son had not any fee by the devise, but by descent and operation of Law. To the second, They may be restrained from selling an Estate for life; and it doth not appear thereby he intended to give a fee. And to the third reason alledged, It is not devised paying such a sum, which is a sum in gross, as it is cited in Willock and Hammonds Case, But that every one shall pay out of his part, towards the payment of the forty pounds per annum to his Wife, which is quasi an annual rent out of the profits of the land, and

and no sum in gross, and therefore no fee given. And as to that objection in the Will, That where he deviseeth lands to his several Sons, That every one should have fee thereby, as well as in a Chattle, it is no Law, without his expresse intent may be collected out of the words; otherwise the Law will not construe it to be fee in prejudice of the Heir, without the word Heirs, or in perpetuum, or which *tant amount*; Whereupon it was adjudged for the Defendant.

Thursby *versus* Warren, Trin. 4. Car. rot. 217.

ERror of a Judgement in the Common Bench, in an Action upon the Case *sur Assumpsit*, by Elizabeth Warren Executrix of William Warren, where the Plaintiff declares; Whereas upon the eighteenth day of July anno 1625. the Defendant was indebted to the said William Warren, being an Attorny of the Common-Bench, in divers summs of money tam pro missis & custagiis per ipsum Willielmum Warren for the said Thursby, laid out at his request for the prosecuting and defending of divers Suits for the said Defendant, and for his fees in divers Terms, besides his expences and other summs of money laid out by the said William Warren, as Servant and Solicitor unto the said Defendant, in divers other Courts in Westminster, at the request of the said Defendant, in prosecution and defence of all his Suits in the said Courts; and in the Court of Lynn Regis, being a Court of Record; as also for his Salary, and divers other summs to him due, and to be paid by the Defendant for his wages, as Steward of divers of his Courts in the County of Norfolk, and yet to him due and unpaid; and also in divers other summs of money expended by him at the request of the Defendant, as well about his other business, as for his labour for the same, to him due and unpaid: And the Defendant being so indebted to the said William Warren, he, the same day and year at Lynn aforesaid, delivered unto him a Note in writing, mentioning the said summs, amounting to thirty nine pounds two shillings and nine pence, requiring him to pay it. That the Defendant in consideration of the premises, then and there assumed and promised, That if James Sedgwick, an Attorny of the Common-Bench there present, would peruse the said Note, and affirm it to be reasonable, he would pay to the said Warren all the summs mentioned in the said Note, And alledges in fact, That the said James Sedgwick the same day, year, and place, upon view of the Note, affirmed it to be reasonable; and notwithstanding, That the Defendant had not paid it to the said William in his life, nor to the Plaintiff his Executrix, licet sapius requisitus. The Defendant pleaded Non Assumpsit, and found against him, and damages assessed to twenty pounds, and Judgement entred, and Error brought, and assigned, because he demanded fees as Solicitor in other Courts, where he was not Attorny, which is *maintenance* and unlawful; and then the Assumpsit being void in part,

is

is void in all, so that when intire damages were given, and Judgement for all, it is Error. And all the Court conceived, That an Attorny may very well be a Solicitor for his Client in other Courts, as well as in the Court where he is Attorny, and is allowable; and a promise to pay him for it, is lawfull: And so may a Servant for his Master, and it is no *maintenance*, as decimo nono Edwardi quarti, folio tertio: Especially as this Case is, having laid out money at his request, and giving a Note thereof to a Stranger, to view whether reasonable or not; and a promise to pay it, if by him thought reasonable, which of it self is a sufficient consideration. And all the Court conceived, That a Solicitor of an inferior rank, which solicits Causes for his Clients, may take recompence, and take a promise to repay what summs he shall lay out; But if a person of superior rank should do it, it were *maintenance*, as it is in decimo nono Elizabethæ; whereupon all the Court agreed, That the Assumpsit was good, and the Judgement was affirmed, See the Case in decimo nono Elizabethæ, Dyer 356. undecimo Henrici sexti, folio decimo; tricesimo secundo Henrici sexti, folio vicesimo quinto; tricesimo quarto Henrici sexti, folio vicesimo sexto. Note also that another exception was taken by Banks; For that the promise was upon the eighteenth day of July 1621, and the breach assigned for not paying upon request, was in September 1621. and the Action was brought in the Common-Bench in Michaelmas Term, anno tertio Caroli Regis, and so above six years after the promise and breach; and then by the Statute of vicesimo primo Jacobi, capite 16. he ought not to maintain that Action: But because it was not pleaded, though the declaration was in Michaelmas, tertio Caroli, the original writ not being certified, nor appearing when it was sued out, the Court did not much regard it, and thereupon the Judgement was affirmed.

This year in Trinity Term there was nothing done remarkable.

Termino

Termينو Michaelis, anno quinto *Caroli* Regis,
in Banco Regis.

Gilpin versus

ERror of a Judgement in Kingston. The Error assigned, Be-
cause in debt upon an obligation made by his Father, he plea-
ded *Reus per descent* the day of the Writ, and Issue being
thereupon, the Jury found, That the Ancestor (whose Heir he is,
and for whose Debt he is sued) was seised in fee of such lands, and
by his Will devised them to the Defendant, being his Son and
Heir, and to his Heirs, upon condition, That he should pay his
Debts within a year, and if he failed, That his Executors should
sell and pay his Debts. They find, That he entred, and did not
pay the Debts, and the Executors after entred, and paid the Debts,
and sold the lands, and thereupon, &c. The Court there ad-
judged, That it was *Assess* in the Heirs hands, because he devised
it to his Son and Heir in fee; and for that cause the Error was
assigned, and it was held, That the Judgement was erroneous:
For although the Heir hath a fee, yet he hath it as a Purchasor,
being tied with such condition; Whereupon rule was given to
reverse that Judgement. 1.

Goodwin versus Sir Richard Moore.

The Plaintiff, by Thomas Goodwin his *prochaine Amie*, against
Sir Richard Moore, one of the Masters of the Chancery, by
Bill in Chancery, in trespass of Battery and false Imprisonment,
the Defendant quoad the Battery pleaded Not guilty, quoad the
Imprisonment he justified, because his Father held of him such lands
by Knights-service, and dyed seised in his homage, for which he
seised the Plaintiff as his Ward, and Issue thereupon; and after
Mittimus out of the Chancery, these Issues were delivered here
to be tried: And now this Term a Trial was at this Barr, and
the second Issue found for the Plaintiff; and it was moved in ar-
rest of Judgement; First, because the Plaintiff sued by *prochaine*
Amie where he ought to sue by his Gardian; and for proof thereof,
the Case betwixt Jones and Symphon was cited sed non allocatur,
because the Plaintiff may sue by Gardian or *prochaine Amie*, but
the Defendant shall sue only by Gardian. Secondly, because there
were not pledges found, sed non allocatur, because an Infant shall
not find pledges. Thirdly, because the Battery and Imprison-
ment are alledged to be at one place, and the land holden by Knight-
service 2.

service at another place, and the *Venire facias* was only from one of the said places, sed non allocatur; for it is now aided by the Statute; Whereupon it was adjudged for the Plaintiff.

Kadwalader, and another, *versus* Bryan.

3. **P**rohibition by them two, upon the Statute of *vicefimo tertio Henrici octavi, capite nono*, because they being Inhabitants in such a Town, where such a Prebend and his Predecessors, time whereof, &c. had used to hold plea of Ecclesiastical Causes, The Defendant sued them upon the Statute before the Ordinary in Causes Ecclesiastical, concerning defamation: The Defendant comes in and pleads, That the Cause Ecclesiastical being depending in the Prebends Court, the inferior Judge there requested the superior Judge to assume it, and upon this barr, it was demurred. The first reason alledged, was, For that it is not shewn, That the Cause was Ecclesiastical, so as the Court might judge whether it were fit to be removed. Secondly, For that he did not shew, That the request is under seal, and if it be not, it is not sufficient to remove the Cause. Thirdly, For that it was in a Peculiar to be removed before the Ordinary, and so out of the Statute, and no cause of Prohibition; But upon view of the Statute it appears clearly, That it extends as well to Suits out of the peculiar Jurisdiction, as out of the Diocesis. And for the other exceptions they were not allowed, because being of a Cause Ecclesiastical, it needs not to shew the particular, as in other pleadings; but as generally pleaded, *concurrentibus his quæ in jure requiruntur*; and for request it is not requisite to have it shewn under seal; and if it ought, it shall be well intended by the pleading. In a feofment there needs not livery to be alledged; nor in assignment of Dower, That it was by metes and bounds needs not to be pleaded; for these necessary circumstances shall be intended, and therefore the barr was held good; also a Prohibition brought by two cannot be good, where the griefs be several; Whereupon consultation was awarded.

Walker *versus* Riches.

4. **A**N Elegit issued after Judgement, and the Writ recited the Judgement, *quod elegit executionem of the goods and moiety of the land*; and the Writ was, *Ideo tibi præcipimus, quod Bona & Catalla of the Defendants, quæ habuit die judicii prædicti redditu, deliberari facias: Omitting these words, Et medietatem terrarum & tenementorum prædictorum, Tenendum the said goods and moiety of the lands, quousque debitum levetur. By vertue hereof the Sheriff extended the lands and goods, and delibered the moiety of the land, and returned the Enquisition: And it was now moved by Calthrop, That this Writ might be amended (for it is but a misprision of the Clerk) and that the Extent might stand: But it was ruled,*

ruled, That it shall not be amended, and that he ought to have a new Elegit, because the Enquisition was taken without warrant, the Sheriff having no warrant to extend those lands.

Topfall versus Edwards.

Action upon the Case for words, for calling him Thief, and for 5.
 Apocuring him to indicted and imprisoned for felony, until he was acquitted. Upon Not guilty pleaded and found for the Plaintiff, and ten shillings damages (so under forty shillings) it was moved upon the Statute of vicesimo primo Jacobi, capite decimo sexto (which appoints, That in Action for words, where the damages are assessed under forty shillings, That he shall have no more costs than damages) That he should have but ten shillings for costs; but the Court conceived, forasmuch as this was not an Action for words only, but also an Action upon the Case in nature of a conspiracy, and the Defendant is found guilty of both, he shall have Judgement for his ordinary costs; And that it is out of the Statute.

Tankersley versus Robinson.

Assumpsit against an Administrator upon promise by the In- 6.
 testate, supposing that the Intestate borrowed of the Plaintiff, upon the first day of May, anno duodecimo Jacobi Regis, twenty pounds, and in consideration thereof promised to repay it him upon request; And that the Plaintiff, upon the first of August, anno duodecimo Jacobi, requested the payment, and he had not paid it; and that the Intestate died, and Administration was committed to the Defendant, who upon request had not paid it, although he had Assets. Upon Non assumpsit pleaded, and verdict for the Plaintiff, Ward Serjeant moved in arrest of Judgement, That this Assumpsit being made in anno duodecimo Jacobi, and the breach in the same year, this Action is brought too long after; for by the Statute of vicesimo primo Jacobi, capite decimo sexto, of limitations, it should be brought within six years: Jones and Whidlock conceived he ought not to have the advantage of this Statute, unless he had pleaded it, or had demurred thereupon, because the said Statute hath divers exceptions; so that if it be brought after the time, yet if the Plaintiff were an Infant, or *Feme Covert*, &c. it were well enough; But Chief Justice, and I my self conceived, for as much as it appeareth by the Plaintiffs own shewing in his declaration, That it is out of the limitation of the Statute; and the Statute is the negative, That it shall not be brought at all, unless it be brought within the time limited by the Statute; therefore the Defendant shall have advantage thereof by exception, without pleading; Whereupon the Court would further advise.

Fryer *versus* Fawkenor.

7. **E**rror of a Judgement in *Shrewsbury* in debt, upon an obligation of forty pounds, conditioned to perform an Award, the Defendant demanded *oyer* of the Bond and Condition, and pleaded, *Quod nullum fecerunt arbitrium*. The Plaintiff imparles, and afterwards replies, and shews the Award and Breach: The Defendant imparles, and after makes defence, and demands *oyer* of the Bond and Condition, and pleads the same Plea as before: And the Plaintiff imparles, and after replies verbatim as before; the Defendant thereupon demurs, and shews causes and reasons that the Award is ill, and long argument for the Defendant: Then the Plaintiff imparles, and after comes and shews divers causes and reasons, and book cases, That this Arbitriment is good; And all these were entred upon the Record; And afterwards Judgement was given for the Plaintiff: And for these absurdities and prolixities in the pleading and defence, it was resolved, That it was an erroneous and vitious proceeding; Whereupon the Judgement was reversed, and the Clerk fined for making such a Record.

Dunscornb *versus* Smith.

8. **T**respas of Assault, Battery, and Wounding. The Defendant pleaded, That the Plaintiff assaulted him, and would have beaten and wounded him, and what he did, was in his own defence, The Plaintiff replies, That an Attachment issued out of the Chancery to arrest the Defendant, and that by special warrant from the Sheriff he arrested him, and laid hands upon him; and the Defendant rescued himself, and beat the Plaintiff *de injuria sua propria absque tali causa*, & hoc paratus est verificare unde, &c. And upon this the Defendant demurred generally, without shewing any cause: And by all the Court the Replication was held vitious, because he did not conclude his Plea, Et hoc petit quod inquiratur per patriam, but relied upon his Plea; Whereupon it was adjudged for the Defendant.

Adams *versus* Hilks.

9. **E**rror upon a Judgement, in *Bristow*. The Error was assigned by *Germis*, because in an Action of *Trover* of four thousand Lemmons apud *Wardam de All Saints in Bristow*, and conversion of them in the same Parish. Upon *Nor* guilty pleaded, the *Venire facias* was of *Bristow*, where it ought to have been of the Ward of *All Saints in Bristow*; for that is the place of the conversion, which is the most certain; and compared it to *Arundells Case*, *Coke* 6. Rep. fol. 14. where a fact was supposed to be in *Parochia Sanctæ Margaretæ in Westminster*; and the *Venire facias* being of *Westminster*,

minster, it was ruled there to be ill, and that it was not aided by the Statute of vicesimo primo Jacobi: For it is a Trial by a wrong Visne: But all the Court held, That the Tryal was good, and cannot be otherwise; for a Ward in a City is but as an Hundred in a County, and thereof there never shall be any Visne; And it is not like to the Case that was put where an Act is supposed to be done, at such a Parish, in such a Ward in a City; there the Visne shall be of the Parish, Vide septimo Henrici sexti, folio tricesimo octavo, & octavo Henrici quinti, folio decimo; Whereupon rule was given, That Judgement should be affirmed, unless other matter be shewn; And so it was done in Adams and Wellings Case, upon a Judgement in Bristow, where the same exception was taken, and the Judgement affirmed, unless, &c.

..... *versus* Hopkins.

Ejectione firmæ. The Plaintiff declares upon a Lease made by Sir Archibald Douglass and Dame Elionor his Wife, of an house and lands in Englefield. Upon Not guilty pleaded, it appeared upon the evidence, That the Lease was sealed and subscribed by them both, and a Letter of Attozny made by them to deliver it upon the land; and it was thereupon strongly urged by Fynch Serjeant, and Sheldon the Kings Solicitor, That a Letter of Attozny by a *Feme Covert* is merely void, and the Lease is only the Lease of the Husband; so the Plaintiff hath failed: But all the Court conceived, It was a good Letter of Attozny for both, and the Lease well delivered; and it is the Lease of them both, during the Husbands life.

10.

Hill *versus* Thornton.

Prohibition. The Plaintiff therein surmising, That his Father died seised of such Lands, which descended to him as Heir, and that the Defendant by Libell in the Spiritual Court had suggested, That he made a Will and devised those Lands to his Executors to sell, and thereby had bequeathed divers Goods and Portions of money, &c. and had made the Defendant Executor therein, who therefore sued in the Spiritual Court to have probate thereof, ubi re vera he did not make such a Will; and a Will of Lands ought not to be proved in the Spiritual Court: And thereupon the Defendant appeared, and shewed for cause of consultation, That the said Testator made such a Will, and made him Executor, and he sued them to prove the said Will; whereupon Issue was joyned, whether he made such a Will. After evidence the Plaintiff was non-suited: And now Godbolt for the Plaintiff moved, That although the Plaintiff be non-suited, yet it doth not appear, that the Defendant hath cause to have consultation: For it is not shewn that the Testator had Goods, &c. and then he hath no cause to have

11.

probate; for a Will of Lands needs not be proved: But of Goods there ought to be a probate, otherwise he cannot have any Action. As if a libell were for Cythes to be paid for Cress, which were not *Silvæ Cedux*; Although the Issue be upon a collateral point, and found for the Defendant, yet he shall not have consultation: So if there be a Suit for laying violent hands upon a Clerk, and to have damages, besides correction; in this case no consultation shall be granted, because he hath not such cause of Suit in the Ecclesiastical Court. And all the Court agreed to those Cases; For it appears there, That there was not any cause of Ecclesiastical Suit: But here in this case it appears, That he hath cause of Suit to prove the Will for the Goods; for otherwise he cannot maintain any Action; Whereupon consultation was granted, That he might proceed, quoad bona. Observe well this Case, and the cause and reason why a consultation was granted, together with the difference between this and Dens Case, ante pag. 114. & 115.

Benson and his Wife *versus* Flower and Blackwells.

22.

Action upon the Case for words spoken of the *Feme*. Upon Not guilty pleaded, and verdict for the Plaintiff, and five pounds damages assessed, and seven pounds for costs, they sue execution; And after the money was levied by the Sheriff, and before the return of the Writ, the Plaintiff became a Bankrupt; and by the Commissioners of Bankrupts, the said twelve pounds so recovered, was assigned by the name of the money of Benson, to Blackwell and other Creditors. The Sheriff brings the money into Court; the Plaintiff who recovered, prayed to have the money delivered unto him out of Court; And the said Blackwell, and the Creditors pray that the money may be delivered unto them, according to the Sale and Assignment of the Commissioners. And whether it should be delivered unto them was the question: Hide chief Justice, and Jones, conceived, That the Sale and Assignment were good, And that the money should be delivered unto them: For the damages being recovered, and the costs assessed by the Judgement, it is a Debt; and an Action of Debt well lies upon this Judgement, And the money being levied is properly appertaining unto him; and therefore in the power of the Commissioners to dispose thereof. And as it may be forfeited to the King by outlawry, or assigned unto the King, and he might cause it to be levied; so may the Creditors upon this Commission. But Whiclock and my self were of another opinion, because it being recovered, and execution awarded, and the Sheriff levying the money before he became a Bankrupt, it is as it were in custodia Legis, and the Creditors cannot give a discharge, nor are they parties in Court, who can acknowledge satisfaction; and if the Judgement be reversed, they be not compellable to make restitution; Whereupon the Court would further advise. Vide residuum postea pag. 176.

Snape

Snape *versus* Norgate.

13.

Scire facias, supposing that he recovered in debt against an Executor, and had Judgement for forty pound, and seven pounds for costs, de bonis Testatoris, si tantum, and if not, then de bonis propriis; And that before satisfaction he dyed intestate; And administration was committed to the Defendant de bonis primi Testatoris, and also of the Executors, And that the Executor had not satisfied; and therefore he sued this Writ, to shew cause wherefore he should not have Execution. The Defendant pleaded Plene administravit of the goods of the first Testator, and Issue thereupon, and found for the Plaintiff, That he had *Assets*: And it was now moved in arrest of Judgement by Reve, That this Scire facias is not well grounded; For the recovery being against an Executor of a debt by the Testator, and he dying intestate, the Suit is determined, and he ought to commence de novo: As if an Executor recover a debt of the Testators, the Administrator shall not have a Scire facias upon this Judgement; so è converso, &c. And Hide chief Justice doubted; but Jones, Whitlock, and my self, conceived, That the Scire facias was well awarded. For true it is, that as Administrator, he cannot have a Scire facias upon a Judgement by the Executor, but it is put to a new Action; For he comes *paramount* the Judgement, and is not party thereto. Yet where a Judgement is against an Executor for the Testators Debt, although he dyeth intestate, this Judgement might be executed by a Scire facias against the Administrator of the first Testator, who cometh in place of the Executor, and being for the Debt of the Testator, is lyable thereto, but as Administrator to the Executor, he is not lyable. The second Exception was, because in the first Action of Debt, whereupon the recovery was against the Executor, the Action being for forty pounds upon Bond, he pleaded Plene administravit, and *Assets* found to twenty pounds; and the Judgement is given against him for forty pounds, whereas it ought to have been but for twenty pounds only; and now in the Scire facias upon this Judgement, *Assets* is found to forty pounds, which ought not so to have been, but for the twenty pounds which is found to be *Assets* in his hands; and the Scire facias ought to have been only for that twenty pounds. But the Court conceived, although *Assets* to twenty pounds only be found, yet Judgement for the intire Debt is good: And the Scire facias being to have execution of forty pounds, and being therein found, he had *Assets* to forty pounds, it may well be conceived, That he had more *Assets* after the first Verdict and Judgement; Whereupon the Plaintiff here had Judgement according to that Verdict.

Chambers Case, cujus principium ante fol. 133.

14. **C**hambers was brought by an Habeas corpus out of the Fleet, and returned, That he was committed to the Fleet by virtue of a Decree in the Star-chamber, by reason of certain words he used at the Council Table (viz.) That the Merchants of England were served up here in England more than in Turkey. And for these and other words of defamation of the Government, he was censured to be committed to the Fleet, and to be there imprisoned untill he made his Submission at the Council Table, and to pay a fine of two thousand pounds. And now at the Barr he prayed to be delivered; Because this sentence is not warranted by any Law or Statute: For the Statute of tertio Henrici septimi, which is the foundation of the Court of Star-Chamber, doth not give them any authority to punish for words only. But all the Court informed him, That the Court of Star-Chamber was not created by the Statute of tertio Henrici septimi, but was a Court many years before, and one of the most high and honourable Courts of Justice: And to deliver one who was committed by the Decree of one of the Courts of Justice, was not the usage of this Court; and therefore he was remanded, Vide 3. Ass. placito 38. 28. Ass. placito 34. 21. Hen. cap. 20.

Gennings *versus* Lake, Hillary 3. Car. rot. 612.

15. **E**jectione firmæ. Upon Not guilty pleaded a special Verdict was found, That the Prior of Launceston was seised in fee of the Tenements within mentioned, which then were four Closets in North Drocomb in Launceston; And upon the twenty eighth day of September, anno vicesimo septimo Henrici octavi, demised them to John Peres by the name of the four Closets in Drocomb, infra Burgum de Launceston, habendum for ninety and nine years, rendering twelve pounds per annum; And afterwards in the thirtieth year of King Henry the eighth, by Indenture inrolled, The said Prior and Convent surrendered all their possessions to King Henry the eighth, who died seised, and by mean descents it came to Queen Elizabeth, who in the four and twentieth year of her reign, by her letters-patents, granted unto Edward Frost and John Walker, and their heirs *Totum illud Messuagium & Tenementum vocat. Drocombs, alias Drotons, ac omnia Terras, Tenementa, dicto Messuagio spectant. vel cum eodem demissa, scilicet. jacent. & existent. in Launceston in Comitatu Cornubiæ, ac nuper Prioratui de Launceston spectantia;* And that these Lands by mean conveyances were come to the Lessor of the Plaintiff: And that before the Leases aforesaid, viz. in anno vicesimo primo Elizabethæ, an house was erected upon a Rod of land, parcell of the said Closets, by the Occupiers thereof, Et quod Tenementum in narratione prædicta mentionatum

natum eodem messuagio spectabat & pertinebat, and was devised and granted with the said Messuage, and was alwayes called and known as well by the name of Drocombs, as by the name of North Drocombs, And that the said Tenements at the time of the dissolution were parcel of the possessions of the said Priory, And that the said Priory had not other Lands in Launceston known by the name of Drocombs or North Drocombs there, besides the Lands in the declaration; and that King James, anno octavo Regni sui, demised those Lands to John Eldred for threescore years, by the name of the four Closes, late in the tenure of John Peres in North Drocombs, under whom the Defendant claims; And thereupon these Questions were moved, First, Whether (the Lease being made by the name of the four Closes in North Drocombs, there being no other name known when it came to King Henry the eighth) the Patent of the twenty fourth of Elizabeth by another name may be good, for that the Queen was not well informed? Secondly, The Patent being made of a Messuage and Lands thereto appertaining: And this Messuage is newly erected after the first year of Queen Elizabeth (For then all the Reversion of the said four Closes is found by the Verdict to come to the Queen) whether the Lands shall pass? For although Land in case of a common person may pass by the name of Lands appertaining to an House, as it is in Hill and Granges Case; yet it cannot be so in Case of the Queen; and if it might be, yet it ought to be for a longer time than twenty years, to be so demised and occupied, if you would have it to obtain a reputation of passing by the word Pertaining. But all the Court conceived, That the Patent is good for the Messuage and all the Land, notwithstanding these exceptions: For although the Land was not built upon, when it was demised, and when it came to the King, and that afterwards a Messuage was erected thereupon, or it were afterwards converted into another nature before the Patent; yet it shall be granted as it is, & by such name as it is known at the time of the Patent; And although it varies from the first name in the Lease, yet being found to be all one, it passeth well by the Patent. Also they conceived, That Land may be said to be appertaining to an House, as well in the Kings Case, as of a common person, where it hath been let and occupied together by a convenient time, Vide Cokes Book of Entries 384. Dyer 362. And afterwards, it was adjudged for the Plaintiff.

Edgar and Webb, *versus* Sorrell.

TRESPASS by original for divers loads of Wheat, The Defendant justifies, for that the Dean and Chapter *Sanctæ & individie Trinitatis* in Norwich ex fundacione Regis *Edwardi sexti*, were seized in fee of the Rectory of Henley in the County of Suffolk, where in the said loads of Corn were growing, and severed from their nine parts, which he took by their commands, and so justifies, and

16.

give colour to the Plaintiff; They replie, That the said Dean and Chapter were seised in fee, And that one Thomas was Dean, and he and the Chapter by Indenture, by the name of Thomas Decanus Sanctæ & individix Trinitatis, &c. (omitting the Words Ex fundatione Regis Edvardi sexti) and the Chapter, demised that Rectory to Thomas Gooch anno nono Elizabethæ Reginae, for ninty and nine years, And from him conveys it by mean Assignement unto Richard Maplesden, and from him to the Plaintiffs; And that they were possessed, &c. until the Defendant took the said Cythes. The Defendant by rejoinder confesseth the Lease, and all the Assignments, except the Assignment by Richard Maplesden, And that he before the pretended Assignment, viz. in anno vicesimo secundo Jacobi Regis, by feofment conveyed the said Rectory unto one William Wilston, for which cause the Dean and Chapter entered into the said Rectory as a forfeiture; And the Cozn being severed from the nine parts, and set out for Cythes, he took them by the command of the said Dean and Chapter, And traverseth the last grant of the term by Richard Maplesden; And thereupon the Plaintiffs demurred: And now Germin for the Plaintiffs shewed his reasons: First, Because the Defendant in the Rejoinder pleaded a feofment of the Rectory, and doth not shew that any gleab was appertaining thereto, whereof he might make a feofment, sed non allocatur; For it shall be intended a good feofment, And that there was gleab land thereto appertaining, Vide decimo quinto Henrici septimi, & decimo sexto Henrici septimi, folio primo. The second Exception was, Because he pleaded an entry after the forfeiture, and shews not a Dæd of command to enter, sed non allocatur; For it is not pleaded, That any entered by their command after the forfeiture, but that the Dean and Chapter themselves entered, which shall be intended a sufficient Entry; and all necessary circumstances shall be implied. Also the feofment is not only a forfeiture, but a disseisin, being by Tenant for years, and then every one may enter on their behalf, where they have right of Entry, Vid. 11. Alsif. plac. 2. The third Exception was taken to the Replication; for this Lease is pleaded to be made by the Dean and Chapter, omitting part of their name; and for this cause was merely void, and so the Plaintiffs had not any title; Wherefore it was adjudged for the Defendant.

Sir John Bodvell *versus* John Bodvell, Mich. 2. Car. rot. 457.

17. **E**Rror of a Judgement at the grand Sessions at Carnarvan, in an Annuity by bill for two hundred and twenty pounds, arrearages of an Annuity granted of twenty pounds, quas ei debet, And counts, That the Defendant Sir John Bodvell upon the fourth day of November anno quarto Jacobi Regis, by a Dæd shewn, had granted to the Plaintiff John Bodvell the said annual Rent, by the name of an Annuity or annual Rent of twenty pounds habendum to him for his life,

life, by virtue whereof he was seised in dominico suo ut de libero tenemento. And for eleven years behind at such a feast, he brings the Action: The Defendant Sir John Bodvell demands *Oyer* of the Dæd, which being entred and read, it thereby appeared, That it was a Rent issuing out of a certain Parsonage in the said County, with a clause of distress upon the Rectory or Church of Kenebkelley, and divers other the Rectories in the said County there mentioned; and pleaded, That the said John Bodvell granted the said Rectory with the Church of Kenebkelley to him and his heirs; whereupon he entred therein, and so pleaded it as an Extinguishment, &c. The Plaintiff John Bodvell saith, That there was nothing granted thereby which was pertaining to the said Church. The Defendant Sir John Bodvell pleaded, That such a piece of land was parcel of the said Rectory and Church: And thereupon they were at Issue, and found for the Plaintiff John Bodvell and Judgement given for him. And now Error was brought by Sir John Bodvell and several Errors assigned upon the Record, to which John Bodvell pleaded *In nullo est Erratum*, And all were over-ruled; And now ore tenus he insisted upon other Errors: First, That he declaring upon an Annuity, or annual Rent granted for life virtute cujus fuit seiscitus in Dominico suo ut de libero tenemento, probes, That it is no Annuity, but a Rent-charge, And that he made it his election to have it as a Rent-charge: and in proof thereof was cited tertio Edvardi sexti, Dyer 61. & quinto Elizabethæ, Dyer 220. sed non allocatur; For being an Annuity granted for life, although it is no Rent-charge, yet he may plead seiscitus in Dominico suo ut de libero tenemento; And although such exception were taken by Bendlosse, in tertio Edvardi sexti, who cited that Case, yet the Court notwithstanding resolved for the Plaintiff: And the Lord Coke, in his Book of Entries, fol. 49. & 50. hath two several declarations in this manner, And yet the Plaintiff had Judgement. The second Error assigned ore tenus was, That this bill of Annuity is not maintainable, but he ought to have brought an original Writ; For the Statute of cricesimo quarto Henrici octavi, capite sexto, doth appoint, That in Wales Actions real and mixt shall be sued by original Writ, and not by Bill, but Actions personal may be there sued by Bill; And that this is an Action mixt, he relied upon 2. Hen. 4. fol. 13. Fitz Herb. Rent. 48. Release of Actions real is a good barr in this, so Release of Actions personal: And this being a frank-tenement is rather real than personal: And Coke in his Commentary upon Littleton 285. affirms, That it is a mixt Action. But all the Court conceived, an Annuity brought by bill there, is well brought; For being an Annuity which charges the person who grants it, though with a clause of distress, not being granted by him for himself and his heirs, until Election made, and a distress taken is merely personal: Vide secundo Edvardi quarti, folio octogesimo quarto, long. quinto Edvardi tertii, folio quadragesimo: and therefore a release of Actions personal is clearly a barr; also Noy

for the Defendant in the Writ of Error moved, That this being not assigned for Error, the Plaintiff should not have advantage thereof; for the Statute refers, That Suits shall be as in North-wales, & clearly in North-wales the custom was to sue by Bill or Plaint: And if he had assigned, That for Error the Defendant here might have maintained it, by custom of North-wales, as in tricesimo sexto Edvardi primi. Error assigned of a Judgement in Wales in a Quod ei deforciat, in nature of a Disseisin, and in Wales the Seisin is alledged post ultimam pacem proclamata, whereas in England it is post primam transfretationem. And it was maintained by custom of North-wales, vide decimo octavo Edvardi secundi, Alsise 354. tertio Edvardi tertii, folio decimo nono; Hillary sexto Edvardi tertii, rotulo vicesimo octavo in this Court. Error assigned because they held plea of Lands in North-Wales, where the Land was held of the King in Capite; and for that cause it was reversed, and the reason entred upon the Roll: So it appeareth they have Jurisdiction to hold plea of Lands not held of the King, And that Jurisdiction by the Statute is in the Affirmative, as it is held, Coke 8. Rep. fol. 110. Doctor Fosters Case, and tricesimo tertio Henrici octavi, Dyer 50. A Statute in the Affirmative doth not take away a former Statute, but they stand together. But the Court did not rely on this point, because for the former reasons they all held, That this Judgement was good enough; And the Judgement was affirmed.

Grosse *versus* Gayer, Hill. primo Car. rot. 828.

18. **I**N Ejectione firmæ. Upon a special Verdict the Case was; Treegose was endicted of a Premunire, upon a Statute of decimo tertio Elizabethæ Regina, and afterwards made a gift in tail of that Land, and was after attainted by Verdict, and had Judgement for the said offence; And it was afterwards found by Enquisition, upon a Commission out of the Exchequer, That Treegose was seised in fee of those Lands at the time of the offence committed, And that the Queen by patent granted those Lands to Sir George Carie, under whom the Plaintiff claims, And the Defendant under the title of the Tenant in tail, And if, &c. The principal point argued was, Whether an Attainder in a Premunire shall have relation to the offence for the forfeiture of his Lands, or only to the time of the Judgement? Secondly, admitting that this forfeiture shall relate to the offence, Whether this Patent after the Enquisition, by Commission under the Exchequer Seal (no Office being found by Commission under the great Seal) be good by the Statute of decimo octavo Elizabethæ capite secundo, which makes patents upon valuable consideration good, notwithstanding there be not any Enquisition found by the Commission under the great Seal? And quoad the first point,

point, the Iustices did not resolbe, being a Case of difficulty; But for the second, they all resolved, That by this Judgement, He should forfeit, &c. That in that Case nothing vested in the King untill office found; And it ought to be an Office by Commission under the great Seal; For the Frank-tenement being in the party offending (and as this case is, in a stranger by the gift in tail) at the time of the Attainder, it shall not be divested from him, and in the King without Office by Commission under the great Seal, which is only an Office to intitle the King, and not by Enquisition by virtue of a Commission under the Exchequer Seal, which is but for instruction or information to the King, and for his Officers to put the Lands holden of the King in charge. But here the Lands are not come unto the King untill office found; Therefore for this point only, it was adjudged for the Defendant: And this is out of the Statute of decimo octavo Elizabethæ, Vide Coke 1. Rep. fol. 42. & 3. Rep. fol. 10. & 5. Rep. fol. 52. Plowd. 486. Dyer 325. 29. Hen. 8. *Charter de pardon* 52. 27. Hen. 8. *Office devant Escheator* 17.

The Earl of Pembroke *versus* Bostock and Green.

19.

QUare Impedit for the Church of Mortesfont, wherein he counts, That Queen Elizabeth was seised in fee of the Advowson of the said Church, as in gross, and presented Mr. Pinder, who was admitted instituted and inducted, And that afterwards she granted the Advowson in fee to Sir Christopher Hatton, who by his Deed granted it to Sir Walter Sands Knight, who dyed seised, which descended to Sir William Sands his Son and Heir, who, in anno duodecimo Jacobi, granted the next avoidance to Henry Earl of Danby, who granted it to the Plaintiff, and he, for the disturbance, brings this Action. The Defendant Green pleaded, Quod prædictus Willielmus Sands non concessit, and Issue thereupon. And Bostock pleaded and confessed Queen Elizabeths Title, And that, before she had presented Mr. Pinder, she presented Richard Donnel, who was admitted instituted and inducted: And that afterwards the Queen presented Mr. Pinder (the Church being full of the said Richard Donnel) who was admitted instituted and inducted; And that afterwards, the said Queen Elizabeth granted unto Sir Christopher Hatton, &c. as in the declaration, And that he conveyed it to Sir Walter Sands, who, in anno octavo Jacobi, let the said Advowson to John Moore Serjeant at Law, for one and twenty years, who granted it to Green the Defendant, And that the Church became void by the death of Richard Donnel; whereupon he presented the Defendant, Mr. Bostock, unto it, and traverseth, That the Church was void at the time of the Institution of the said Pinder, and Issue thereupon, and found for the Plaintiff for that second Issue: And upon the first Issue a special Verdict was found, That at the time of the Grant, by William Sands, he

was Esquire only, and not Knighted : And upon that also, Judgement was given for the Plaintiff : And upon this Judgement, Error was brought. The first Error assigned was, Because he counts of a Grant by William Sands Knight, and it was found he was not Knight ; And so it being a void Grant by that name, and the declaration untrue, Judgement therefore ought to have been for the Defendant. But all the Court conceived, although it is found, That he was not Knight at the time of the Grant, yet it is not material : For the Issue being, Whether William Sands granted, &c. that finding is idle and superfluous, and is not material ; But peradventure if the Issue had been upon that Grant to Walter Sands Knight, and the matter had been found, it had been material, as it is in anno decimo tertio Elizabethæ Reginae, Dyer 300. where the Issue was, whether Sir Thomas *de la Warr* Miles, Lord *de la Warr* concessit ? And it was found, That he made that Grant in the life of his father, so as he was not then Lord *de la Warr*, nor Knight, which was against him that pleaded it. But here the Issue is upon the Grant by William Sands, and whether it appears that he was a Knight at the time of the Grant or not, is not considerable ; For the Grant is good enough, and he had good title to grant, Vide quarto Henrici sexti, folio primo by Rolfe ; vicesimo primo Edvardi quarti, folio septuagesimo primo & septuagesimo secundo ; tricesimo octavo Henrici sexti, folio tricesimo octavo ; septimo Henrici quarti, folio septimo ; vicesimo sexto Henrici sexti, Bro. 100. where it shall be by an Innendo, and the Grant shall not be hurt thereby ; and when it is admitted in pleading, the finding of the Jury shall not prejudice. The second Error assigned was, That the Defendant Bostock in his pleading, pleaded a precedent Lease for years to John More, before the Grant by him, under whom the Plaintiff claims, which is good title for the Defendant, and destroys the Plaintiffs title, if it be true, which the Plaintiff doth not expressly deny, but by his protestation ; so it is not denied by the Plaintiff ; And therefore for this cause the Plaintiff ought not to recover. And Judgement ought not to be given for him, but for the Defendant ; And in proof hereof were cited septimo Edvardi quarti, folio vicesimo, Dyer 119. duodecimo Edvardi quarti, folio septimo ; nono Henrici sexti, folio vicesimo sexto ; decimo Edvardi quarti, folio nono, sed non allocatur ; For although it had been a good plea, and would have destroyed the Plaintiffs title, if the Defendant had relied thereupon, and the Plaintiff ought to have answered it : Yet when it is pleaded by way of inducement only to the Travers, and he traverseth other matter in the Court ; The not-answering or making protestation thereto by the Plaintiff, is not material ; And the Issue being joyned upon the Abordance, and that being found, and not denied by the Plaintiff, is not material ; For the Travers waits upon the matter precedent, Vide Coke 6. Rep. fol. 24. Reads Case ; long. quinto Edvardi tertii, folio nono ; tertio Edvardi tertii, folio decimo septimo ; whereupon

whereupon the Judgement was affirmed; And the Court assessed the damages to fourscore pounds, although the value was found in the Verdict to be an hundred pounds per annum: Yet because the Defendant in the Writ of Error had obtained a Writ to the Bishop; and his Clerk was admitted, instituted, and had gotten the possession, untill he was removed by a Writ of Restitution, which was half a year and more, The Court would give but sixty pounds for damages and twenty pounds for costs,

..... *versus* Heylers.

T Respals by *Baron & Feme* for Battery done to them both ad 20.
damnum ipsorum; The Defendant pleaded Not guilty, and it was found for him and certified, That he did it as Constable in execution of his Office: And double costs were prayed, according to the Statute of septimo Jacobi, capite quinto. But Henden Serjeant moved, That the declaration was ill, Because *Baron & Feme* cannot joyn in Battery done to them both, as it is nono Edwardi quartii: And therefore Judgement ought to have been given against the Plaintiff upon the Declaration, and not upon the Verdict: And no costs ought to have been given. But all the Court conceived, Because the Defendant is found Not guilty, And what he did was as Officer, And the Statute gives him double costs for his vocation, which vocation appears, the Plaintiffs shall not take advantage of the insufficiency of the Declaration and Writ, to excuse themselves of costs.

Jesses Case.

Jesses was indicted, For that he exhibited an infamous Libell directed to the King, against Sir Edward Coke, late chief Justice of the Kings Bench, and against the said Court, for a Judgement given in the said Court in the Case of Magdalen Colledge, affirming the said Judgement to be Treason, and calling him therein Traytor, perjured Judge, and scandalizing all the Professors of the Law, and containing much other scandalous matter: And fixed this Libell upon the great Gate at the entrance of Westminster Hall, and in divers other publique places. And being hereupon arraigned, prayed, That Counsel might be assigned him, which was granted, and he had them, but would not be ruled to plead as they advised; But put in a scandalous Plea, and insisting upon it, affirmed he would not plead otherwise; Whereupon it was adjudged, He should be committed to the Marshall, And that he should stand upon the Pillory at Westminster and Cheapside with a Paper mentioning the offence, And with such a Paper be brought to all the Courts at Westminster, and be continued in prison, untill he made his submission in every Court, And that he should be bound with Sureties to be of good behaviour during his life,
And

21.

And should pay a thousand pound fine for that offence to the King.

R C's Case.

22. **T**he same day R. C. was brought to the Barr (being removed from St. Albans by Habeas Corpus and Cerciorari, where he was a Prisoner, and attainted for Felony (viz for Horse Stealing) And it was now demanded of him what he could say, why Execution should not be done upon the Enditment; and because he could not shew good cause to stay the Execution, he was committed to the Marthall, who was commanded to do Execution; And the next day he was hanged.

Symms *versus* Smith.

23. **C**ovenant. Whereas the Defendant (reciting that she had an Estate for life in such customary Lands) covenanted, That she would surrender the Estate upon request, and permit the Plaintiff to enjoy the said Lands, and take the Rents, Issues, and Profits of them; And in factio assigns for breach, That she did not suffer him to enjoy the said Lands, but had received the Rents, Issues, and Profits of them from the time of the making of the Indenture until the day of the Writ, &c. The Defendant demurs upon this Declaration: And it was now argued at the Barr by Ball for the Plaintiff, and by Rolls for the Defendant. And the Plaintiff shewed for cause; First, That there was not any request alledged for the Permission, sed non allocatur; For the Request extends only to the Surrender, and not to the Permission. Secondly, That he doth not alledge a special disturbance by entry or otherwise. Thirdly, The breach is too general in assigning, That she received the Rents, Issues, and Profits of the Lands, without shewing what; so as it might be issuable, and thereby recover in damages as much as the Defendant received, according as it shall be proved to the Jury; But the Court conceived that in Covenant he may assign as many breaches as he will, though not in debt upon an Obligation for performance of Covenants: For in that Case there ought to be a certainty, and certainly assigned: but in a Covenant it may be assigned as general as the Covenant is; and therefore it was adjudged for the Plaintiff, Vide Cok. Rep. 1. fol. 6. 47 Ed. 3. 3. 46 Ed. 3. 4.

Benson *versus* Flower, cujus principium ante folio 166.

24. **I**t was moved again the last day of this Term, And the Assignment before the Commissioners was read in Court; And for as much as the becoming Bankrupt, and the Assignment of the Commissioners were after the Writ of Execution served; Although they were before the return of the Writ, Jones, Whitlock, and my self

self conceived, That the money in the Sheriffs hand was not assignable, although by the Judgement the damages and costs were certain, and turned into rem Judicatum, for it cannot be said to be the Bankrupts money, until it be paid unto him, and in the mean time it is in the hands of the Sheriff, quasi in custodia Legis. And the Case is so much the stronger, because it was upon a Capias ad satisfaciendum, and the money paid to the Sheriff to satisfy the Execution, so as it is not due to the Plaintiff, until it be paid unto him. And none may give a discharge thereof, but the Plaintiff, who is Party to the Record: And being levied by Record, it ought to be delivered unto him, who may acknowledge satisfaction upon the Record. And the Assignees are Strangers to the Record, and cannot have the benefit thereof; therefore it was resolved by the assent of Hyde the chief Justice, who first doubted thereof, That this money should be delivered to the party who recovered, he acknowledging satisfaction.

Shalmer *versus* Foster and his Wife. Trin. 5. Car. rot.

Action upon the Case for words: For That the Wife of the Defendant spake of the foresaid Plaintiff, to Anne Rochester the Plaintiffs Sister, these words, Where is that lying Thief thy Son? (innuendo the Plaintiff) He hath murdered my Aunt (quandam *Dorotheam Stoke*, amitam Defendantis innuendo) and I will prove it: The Defendant pleaded Not guilty, and found for the Plaintiff; and moved in arrest of Judgement, That these words are uncertain of whom they were spoken, no precedent Communication being alledged to be of the Plaintiff, nor that he was the only Son of the said Anne Rochester, to whom the words were spoken; and it may be that she had divers Sons, and every of them might have an Action as well as the Plaintiff: And therefore without such averment or precedent Communication of him, that the Slanders by might know without ambiguity who is meant by the words, the Action is not maintainable, And Whitlock, and my self were of that opinion; For non constat de persona; and in proof of that point I cited a president, Pasch. vicesimo Jacobi, betwixt Harvey and Chamberlain, and another Case, Trin. decimo quinto Jacobi, betwixt Benner and Codnam, where for such words it was adjudged for the Defendant: But Hyde chief Justice and Justice Jones doubted thereof, because it was alledged, That she spake of the Plaintiff, and is found guilty: But it was thereto answered, That so are the words in every declaration, and so it was in the presidents cited: But because the words be not put in certain nor aided by averment, the declaration is not good, and cannot be aided by the Verdict; Whereupon the Court would advise, Et adjournatur.

25.

Termine Hillarii , anno quinto *Caroli* Regis,
in Banco Regis.

Deckrow, & alii, *versus* Jenkins.

1. **E**jectione firma, against four, of an house and twenty Acres of Land; Thre of the Defendants were found guilty of the house, and ten Acres of Land, and Not guilty for the residue. The fourth Defendant is found Not guilty generally, and Judgement was entred, That he should recover his term in the house and ten Acres of Land, and costs against the thre Defendants; And that the said thre Defendants capiantur, And that they be acquitted quoad residuum, whereof they be acquitted, And that the Plaintiff quoad the thre Defendants, pro falso clamore, for so much as they were acquitted; and pro falso clamore against the fourth Defendant, sit in misericordia. And because there were not two severall Misericordia's, scilicet, quoad the thre Defendants, pro falso clamore, pro tanto, &c. whereof they were acquitted, quod sit in misericordia. And pro falso clamore, quoad the fourth Defendant, quod sit in misericordia: But joynt quoad all the Defendants, quod sit in misericordia. It was assigned for Error, and much insisted by Germin, That it was Error, Because there ought to have been severall Amercements; And the joyning of both Amercements in one is Error; And in proof thereof he relied upon Cok. Rep. 8. fol. 59. Beechers Case. But Broome Secondary affirmed it to be the usual course of that Court, if the one Defendant is found guilty for part, and not found guilty for the residue, and the other Defendant is found not guilty for all, Then the Entry is, That the Plaintiff be in misericordia but once, which is specially entred; whereupon the Court would further advise. And being moved again afterwards, Judgement was affirmed, Vide quadragesimo septimo Edwardi tertii, folio decimo; nono Henrici sexti, folio secundo; Cokes. Rep. folio quinquagesimo nono. Note the Prenotaries said, That it is their usual course to make Entries in this manner, Yet that sometimes they find Entries have been made thus; That quoad the thre for so much whereof they were acquitted, That he be in misericordia, And for the fourth, That he be in misericordia.

Gryffyth *versus* Jenkins.

Error upon a Judgement in Wales, in a Quod ei deforciat in nature of a Writ of Right. The first Error assigned was, Because

cause the Writ being general, The Count is, That he despoiled him of a Mesuage, and of nine and twenty Acres of Land, thirty Acres of Meadow, fourty Acres of Pasture, and of twenty Acres de *Jampna & Brueria*, which ought to be shewn in certainty; as in a Præcipe of twenty Acres of Meadow and Pasture, if he shewes not in particular the quantity of every of them and their nature, it is ill. But here in this Quod ei deforciat it is well enough; for *Jampna* and *Brueria* are not intended Lands of several sorts, but of one and the same Land, which is heath ground, whereupon Gozle and furs are growing. And in proof thereof was cited the Case of the Lady Howard against Candish in dower. The second Error assigned was, That the Issue is not well joyned, Because he pleaded he hath majus jus tenendi tenementa prædicta; then the Plaintiff and he doth not say sibi & Heredibus suis, according to the usual course: For it may be, That he was Tenant for life, or Tenant in tail; and therefore because he did not shew in certainty *que estate*, it was ill, sed non allocatur; For the Court would not intend he had a lesser Estate than in fee; and if he were but Tenant for life, it was at his own peril, to plead in that manner; for it is a forfeiture of his Estate: And it was held to be no Error. The third Error assigned was, Because the Venire facias had not fifteen dayes betwixt the Teste and the return thereof, but was the next day after the Teste. Sed non allocatur; For in Wales they have their Process from day to day in one and the same Session: Wherefore the Judgement was affirmed.

Gylbert *versus* Fletcher, Trin. 4. Car. rot. 1359.

Covenant against an Apprentice for departing from his Service without licence, within the time of his Apprentiship. The Defendant pleaded, That at the time of the making the Indenture, he was within age; And thereupon it was demurred: And it was argued at the Barr, That this Indenture should bind the Infant, Because it was for his advantage to be bound Apprentice, to be instructed in a Trade; he is also compellable by the Statute of quinto Elizabethæ Regiæ, to be bound out an Apprentice: But all the Court resolved, That although an Infant may voluntarily bind himself Apprentice; And if he continue Apprentice for seven years, he may have the benefit to use his Trade: Yet neither at the Common Law, nor by any words of the Statute of quinto Elizabethæ, a Covenant or Obligation of an Infant for his Apprentiship shall bind him. But if he mis-behave himself, the Master may correct him in his Service, or complain to a Justice of Peace, to have him punished, according to the Statute; But no remedy lyeth against an Infant upon such Covenant; And therefore it was adjudged for the Defendant. Vide vicesimo primo Henrici sexti, folio tricesimo primo; vicesimo primo Edwardi quarti, folio sexto; nono Henrici sexti, folio octavo.

3.

Babington *versus* Wood.

4. **D**Ebt. Upon an Obligation conditioned, whereas the Plaintiff intended to present the Defendant to such a Benefice, That if the Defendant at any time after his admission, institution, and induction, at the Plaintiffs request, resigned the said Benefice into the hands of the Bishop of London, That then, &c. The Defendant upon Oyer of the Condition demurred generally: And this was argued by Grimston for the Plaintiff, and by Calthrop for the Defendant, who shewed, That the cause of demurrer was, For that the condition of the Bond, being to resign upon request of the Patron, it is Symonie and against Law, so the Bond void. But all the Court conceived, That if the Plaintiff had averred, That the Obligation was made to bind him to pay such a sum, or to make a Lease, or other Act, which appears in it self to be Symony; then upon such a Plea, peradventure it might have appeared to the Court to be Symonie, and might have been a question, whether such a Bond for Symony should be void? But as it is pleaded by the Condition, it doth not appear that there is any Symonie: For such a Bond, to cause him to resign, may be good, and upon good reason and discretion required by the Patron (viz.) if he be non resident, or takes a second Benefice by a Qualification, or the like. And a president was shewn in octavo Jacobi betwixt Jones and Lawrance, where such a Bond was made to resign a Benefice upon request, when the Son of Jones came to twenty four years of age, to the intent, that he then might be presented unto it; And it was adjudged good in the Kings Bench, and affirmed in a Writ of Error in the Exchequer Chamber. And of this opinion was all the Court; whereupon Judgment was given for the Plaintiff.

Keyley *versus* Manning, Trin Car. rot. 971.

5. **C**ovenant for not building of an House; where the Defendant Covenanted, That he would erect three Houses upon such Land demised unto him, unless he were restrained by the Kings Proclamation, &c. The Defendant pleaded, That such a day and year the King made a Proclamation to restrain building; and thereupon the Plaintiff demurred: And the cause shewn, was, Because a Proclamation was pleaded, and no place expressed where the Proclamation was made, and so no *Visne*, if Issue should have been joyned thereupon, Also because it is not pleaded to have been made sub magno Sigillo Angliæ, otherwise it is not good. And of this opinion were all the Court, upon the first motion, Because a Proclamation binds not unless it be under the great Seal; and if it be denyed, there can be no Issue thereupon (but only *Nul tiel record*) which cannot be, unless he pleads it to be sub magno Sigillo. But afterwards

afterwards, being again moved, Jones and Whitlock seemed to doubt thereof, Because when it is pleaded, That such a Proclamation was made, it shall be intended duly made : As in *rescous* it is returned, quod fecit warrantum, although it be not pleaded to be in writing, yet it shall be so intended. But it was thereto answered, True it is, when it is but by way of inducement, But otherwise, when it is the substance of the Plea : Whereupon it was adjourned.

The King *versus* Sir John Eliot, Denzell Hollis,
and Benjamin Valentine.

AN Information was exhibited against them by the Attorney-General, reciting, That a Parliament was summoned to be held at Westminster decimo septimo Martii, tertio Caroli Regis ibid. inchoat. And that Sir John Eliot was duly elected, and returned Knight for the County of Cornwall, And the other two, Burgesses of Parliament for other places, And Sir John Finch chosen Speaker. That Sir John Eliot machinans & intendens, omnibus viis & modis, seminare & excitare discord, evil will, murmurings, and seditions, as well versus Regem, Magnates, Prælatos, Proceres, & Justiciarios suos, quam inter Magnates, Proceres, & Justiciarios, & reliquos Subditos Regis, & totaliter deprivare & avertere regimen & gubernationem Regni *Anglie*, tam in Domino Rege, quam in Conciliariis & Ministris suis cujuscunque generis ; & introducere tumultum & confusionem in all estates and parts, & ad intentionem, That all the Kings Subjects should withdraw their affections from the King. The twenty third of February anno quarto Caroli in the Parliament, and hearing of the Commons, falso, maliciose, & seditiose, used these words, The Kings privy Counsel, his Judges, and his Councell learned, have conspired together to trample under their feet the liberties of the Subjects of this Realm and the Liberties of this House. And afterwards, upon the second of March anno quarto aforesaid, the King appointed the Parliament to be adjourned untill the tenth of March next following, and so signified his pleasure to the house of Commons : And that the three Defendants, the said second day of March quarto Caroli, maliciose agreed, and amongst themselves conspired to disturb and distract the Commons, That they should not adjourn themselves, according to the Kings pleasure before signified ; And that the said Sir John Eliot, according to the agreement and conspiracy aforesaid, had maliciously in propositum & intentionem prædict. in the House of Commons aforesaid, spoken these false, malicious, pernicious, and seditious words precedent, &c. And that the said Denzell Hollis according to the agreement and conspiracy aforesaid between him and the other Defendants, then and there falso, maliciose, & seditiose, uttered hæc falsa, maliciosa, & scandalosa verba precedentia, &c. And that the said Denzell Hollis and Benjamin Valentine,

6.

tine, secundum Agreementum & conspirationem prædict. & ad intentionem & propositum prædict. uttered the said words upon the said second day of March, after the signifying the Kings pleasure to adjourn: And the said Sir John Fynch the Speaker endeavouring to get out of the Chair according to the Kings command, They vi & arm's, manu forti & illicito assaulted, evill intreated, and forceably detained him in the Chair; and afterwards, he being out of the Chair, they assaulted him in the House, and evill intreated him, Ec violenter manu forti & illicito drew him to the Chair, and thrust him into it; whereupon there was great tumult and commotion in the House, to the great terror of the Commons there assembled, against their alleagiance in maximum contemptum, and to the disherison of the King his Crown and dignity; for which, &c. To this Information, the Defendants appearing, pleaded to the Jurisdiction of the Court, That the Court ought not to have consuance thereof, because it is for offences done in Parliament, and ought to be there examined and punished, and not elsewhere: It was thereupon demurred, and after argument adjudged, That they ought to answer: For the charge is for conspiracy, seditious acts, and practices, to stop the adjournment of the Parliament, which may be examined out of Parliament, being seditious and unlawful Acts; And this Court may take consuance and punish them. Afterwards divers Rules being given them to plead, and they refusing, Judgement was given against them, viz, against Sir John Eliot, That he should be committed to the Tower, and should pay two thousand pounds Fine, and upon his enlargement should find Sureties for his good behaviour: And against Hollis, That he should pay a thousand marks, and should be imprisoned, and find Sureties, &c. And against Valentine, That he should pay five hundred pound Fine, be imprisoned, and find Sureties. Note, That afterward in the Parliament, 17. Car. It was resolved by the House of Commons, That they should have recompence for their Damages, Losses, Imprisonments, and Sufferings sustained for the Services of the Common-Wealth in the Parliament of 3. Caroli. Vide postea fol. 604. The Votes of the House of Commons and resolution of the Lords concerning the Illegality of this Judgement, Anno Dec. nono Car. sec.

Termino

Termino Paschæ, anno sexto *Caroli* Regis,
in Banco Regis.

Thomas Pewes Case.



THOMAS PEW was arraigned for the murder of one Gardiner; and upon evidence it appeared, That the said Gardiner was a Bayliff sworn and known, and under Bayliff to the Dean and Chapter of Westminster: And he having the Sheriffs Warrant to arrest the said Thomas Pew, upon a Capias out of the Common-Bench, and seeing him in Sheerlane within the liberty of Westminster, the said Pew seeing him come towards him, drew his Sword, and the said Gardiner approaching to lay hold upon him (not using any words of arrest, as was proved) Thomas Pew said (as it was proved upon examination of two Witnesses before the Coroner) Stand off, Come not neer me, I know you well enough, Come at your perill; and the Bayliff taking hold of him, he thrust him with his Sword, that he dyed immediately. It was held by all the Court, That it was murder: For he coming as an Officer to arrest, and not offering any other violence or provocation, although he used not the words I arrest you, or shewed him any Warrant, because peradventure he had not time, nor was demanded the cause, the Law presumes it to be malice and murder in him, that so kills one, being an Officer, and coming to execute Process.

1.

Sir Stephen Bord *versus* Cudmore.

Error of a Judgement in Debt in the Common-Bench. The Error assigned was, because Debt was brought in London by Cudmore as Assignee of J. S. of a Reversion of Land, in the County of Somerset, upon a Lease for years made at London of the said Lands, rendering the rent of twenty pounds yearly at Temple Church London, supposing the Lease to be made at the Parish of St. Mary Bow in Ward of Cheap London, for two years rent behind after the assignment of the Reversion and attornment thereto; whereas the Action ought to have been brought in the County of Somerset, where

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where the Land lies, because the privity of Contract failing by assignment of the Reversion, he is only to maintain the Action upon the privity in Law, for the interest of the Reversion; and that ought to have been brought in the County of Somerset, where the Land lies. And this was agreed on the other side, unless the rent had been reserved payable at London; and in that case the Action may be laid in London; for payment might have been there pleaded. And, upon Nil debet, those in London might best take consuance of the payment; and therefore the Judgement was well given, and not Error. But all the Court conceived, for as much as the privity of the Contract is gone by the assignment of the Reversion and the Attornment, and the Rent follows the Land, the Plaintiff being only entituled thereunto by reason of his having the Land; therefore the Action ought to have been brought only in the County where the Land lies, and not elsewhere; Whereupon the Judgement was reversed, Vide 16. Hen. 7. 1. Coke 7. Rep. fol. 2. 38. Hen. 6. 15.

James *versus* Hayward.

3. **T**Respass for breaking his Close, and pulling up, and cutting, and casting down a Gate: The Defendant justifies, because the Gate was placed cross the High-way, and so fixed, That the Kings Subjects could not pass without interruption, by reason of the said Gate, to the nuisance of the Kings Subjects; and therefore he pulled up, cut, and cast down the said Gate to use the said way. The Plaintiff shews that he set up two posts of each side of the way, and hung the Gate upon one of the said posts, for the preservation of the Springs of the Wood there, from Cattle, so as the Subjects might pass the said way without prejudice or impediment at their pleasure: And traverseth, That the Gate was so fixed and tyed, that the Kings Subjects could not pass without interruption by the Gate; and upon that Plea the Defendant demurred. The first question was, Whether the erecting of a Gate cross an High-way, which may be opened and shut at the pleasure of passengers, be a common Nuisance in it self, in the eye of Law, It being an open Gate fixed upon hinges, that Subjects may pass the said way at their pleasure? And secondly, admitting it be a Nuisance, Whether every one may pull up and cast down the said Gate at their pleasure? For the first, Hide, Jones, and Whillock conceived, That the erecting of a Gate (although it be not locked, or tyed, but that every Subject may open it, and have passage at his pleasure) is a Nuisance; for it is not so free and easie a passage as if no such inclosure had been; for women and old men are more troubled with opening of Gates than they should be if there were none. But it seemed to me, That it is not any Nuisance in it self, being so small a trouble, but much for the publique good, that there should be inclosures for the preservation of corn and grass, from Cattle

Cattle straying. And the Law accounts not such petty troubles to be Nuisances: For it appears, That there be many Gates in divers High-ways, which have been alwayes allowed: And if it were a Nuisance in se, there should not be any Gate; for there cannot be any Prescription for a Nuisance; and the multitude of Gates in several ways prove, That it never was accounted to be any Nuisance: and 2. Ed. 4. 2. the erecting of a Gate upon the way is pleaded, and to be admitted lawful enough. For the second, they held, That admitting it to be a Nuisance, although the usual course is to redress it by Endowment, yet every person may remove the Nuisance: And Hide, Jones, and Whitlock allowed, That the cutting of the Gate was lawful; whereupon Judgement was for the Defendant. And Jones said, That for ancient Gates upon High-ways, it shall be intended they were by licence from the King, and upon Ad quod damnum sued out of Chancery. But I conceived, That cannot be for a stopping, &c.

Spalding versus Spalding.

Error of a Judgement given in Ely. Upon a special Verdict the Case was, That John Spalding had Issue three Sons, John, Thomas, and William: He devised the Land in question to John his eldest Son and the heirs of his body, after the death of Alice the Devisors Wife; And if John died, living Alice, That William shall be his heir. And he devised other Lands to Thomas and the heirs of his body, and if he died without Issue, That then John should be his heir. And he devised other Lands to William and the heirs of his body; And if all his Sons should die without heirs of their bodies, That then his Lands should be to the Children of his Brother. John dyes having a Son, in the life of Alice, and Alice dyes, and William enters upon the Son of John: And whether his Entry were Congeable, was the question? And it was adjudged in the Court at Ely, That the Entry of William the Son of John, in the life of his Brother Johns Son, was lawful: And this point was assigned for Error. And now Hedley Serjeant moved, That the Judgement was well given; For he pretended, this devise being to the heirs of his body, and if he dyed, living the said Alice, That William should be his heir, That it is a limitation to the Estate of John, if he dyes in the life of Alice, That then William should be his heir; for that *tant amounts*, That the Land should remain to William presently; And it is not mentioned, That if he dye, living Alice, without heir of his body; so it is a contingent Estate to William, and relied upon septimo Edwardi sexto, title Done, and the Case of Pell and Brown in this Court, Hill. decimo septimo Jacobi rot. 44. But all the Court conceived upon the whole Context of the Will, That it is to be construed according to the intent of the party, And that the construction shall be, That if

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John

John died without Issue, living Alice, That then William his youngest Son should have it; and it shall not be construed (where he limits it first to John and the Heirs of his body, that by this limitation he intended, if he died, living Alice, That William should be his Heir) John having Issue, and thereby to disinherit the Heirs of Johns body: and what was his intent appears by the other parts of the Will, That the other Sons shall have other Lands to them and the Heirs of their body; and if they all die without Issue, That it shall be to his Brothers Children, not meaning to disinherit any of his Children; And it shall not be such a contingent remainder or limitation to abridge the former express limitation; Wherefore they all conceived, That during the time John should have Heirs of his body, William should not have the Land; Whereupon the Judgement was reversed.

Cule versus Executors of Thorn.

5. **A**ssumpsit. Whereas Thorn the Testator, in consideration that the Plaintiff would marry his Daughter Sarah, promised to give him in marriage with her as much as he gave in marriage with any other of his Daughters, and alledges in fact, That he married the said Sarah, And that the Testator had three Daughters, Alice married to Elkin, and Anne, and the said Sarah, And that he gave in marriage to the said Elkin, with the said Alice, an hundred pounds, and gave to him a bond of one hundred pounds, to pay to the said Elkin fifty pounds more at three Months end, after his decease, if the said Alice, or any Issue of her body, were then living; and assigns for breach of the promise, That he had paid unto him only forty pounds in his life, And that he had required of the Defendant his Executor, to whom *assets* was left, the said sixty pounds residue, and a Bond for the payment of fifty pounds more, and averred, That the said Alice had such Issue alive; And for not paying of sixty pounds residue, and not delivering the Bond, he brings this Action. The Defendant pleaded Non Assumpsit, and found for the Plaintiff, and damages assessed to seventy pounds; And moved in arrest of Judgement, That this breach is not well assigned: First, Because he promised to give as much as he gave with any other Daughter; and that extends to as much as he gave in money, and not to the Bond. Secondly, If it extend to the Bond, yet it ought to have been averred, That Sarah or some of the Issue of her body was alive, and not that Alice and the Issue of her body was alive; And so the breach was ill assigned; And the damages being entire, Judgement ought to be for the Defendant. And of this opinion was all the Court, but chiefly for the second point: But as to the first, some of them conceived, That it extends only to money presently given; but they agreed not therein: But in the last they all agreed; whereupon it was adjudged for the Defendant.

Morgan *versus* Green, Administrator of John Green.

DEbt. And demands one hundred and twenty pounds, and declares that where the Intestate was indebted to J. S. in divers summs of money, for wares sold, and that J. S. became a Bankrupt, and by the Commissioners of Bankrupts, was so adjudged: And this Debt amongst others assigned to the Plaintiff, being a Creditor, And that the Intestate died; whereupon he brought this Action against the Administrator, &c. Upon demurrer it was argued by Germin for the Plaintiff, & by Stone for the Defendant, and after argument adjudged, That this Action lies not: For Debt upon a simple Contract lyes not against an Executor or Administrator; And although it was alledged, it being assigned by the Commissioners, is quasi a Debt upon Record, and the Plaintiff inabled to this Suit by Act of Parliament; and therefore Gager of Law lies not, And that for Debt forfeited to the King by the Common Law, no Law-gager lies, as is the common experience in the Exchequer, where such Debts are forfeited and sued. Yet the Court held clearly, That the assigned by the Commissioners doth not alter the Law, but that against an Assignee *ley gager* lies; So against such an Administrator, this Action lies not; Wherefore it was adjudged for the Defendant.

6.

West *versus* Treude, Hill, 5. Car. 101. 318.

Action *sur le Case*: Whereas he was, and yet is possessed of a Lease for divers years, *ad eunc & ad huc ventur.* of an house, and so possessed, demised it to the Defendant for six moneths; and after the six moneths expired, the Defendant being permitted by the Plaintiff to occupy the said house for two moneths longer, That the Defendant during the said time, pulled down the Windows, and divers other parcels of the house, and made great waste therein to the prejudice of the Plaintiff; whereupon he brought this Action. The Defendant pleaded Not guilty, and found against him, and moved by Stone in arrest of Judgement, That this Action lies not; For it was the Plaintiffs folly, to permit the Defendant to continue in possession, and to be Tenant at sufferance, and not to take course for his security: And if he should have an Action, it should be an Action of Trespass, as Littleton. If Tenant at will hath destroyed the house demised, or Sheep demised, an Action of Trespass lies, and not an Action upon the Case. But all the Court conceived, That an Action of Trespass or an Action upon the Case may be well brought at the Plaintiffs election; and properly in this Case, it ought to be an Action upon the Case, to recover as much as he may be damaged, Because he is subject to an Action of Waste; and therefore it is reason, that he should have his remedy by an Action upon the Case; Whereupon

7.

rule was given, That Judgement should be entred for the Plaintiff.

Bachelour *versus* Gage, Executor of Gage.

8. **C**ovenant. Whereas by Indenture bearing date, &c. betwixt the Plaintiff and the Testator of the Defendant, Testatum existit, That the Plaintiff demised such a Messuage or Tenement with a Garden, in the Parish of Saint Martins in the Fields, adjoining to the Plaintiffs house to the Testator, for term of 21. years. And the Testator, by the same Indenture, covenanted for himself, his Executors and Assigns, That he would not erect any building in the said Garden to the prejudice of the Plaintiffs light. The Plaintiff alledges in fact, That such an Assignee of the Testators, against that covenant, had erected an house in the said Garden, to the prejudice of the Plaintiffs lights, in his house adjoining, for which, &c. The Defendant pleads, That the said Lessee assigned over his term to one J.S. who entred and paid his rent to the Plaintiff, and the Plaintiff accepted him for his Tenant. And therefore demanded Judgement *si Actio*, whereupon it was demurred. And now this term 'twas argued by Wild for the Defendant, and by Crawley Serjeant for the Plaintiff. And for the Defendant. First, That this Covenant lies not against the Executor of the Lessee, for he having assigned over his term, and the Lessor having accepted the rent of the Assignee, The privy of contract is determined, especially it being a contract which concerns an act to be executed upon the Land, and therefore runs with the Land, And he cannot have an Action against the Lessee himself or his Executors. And as an Action of Debt lies not against the first assignee, so covenant lies not: But all the Court conceived, That inasmuch as it is an express Covenant, That he shall not build, it shall bind him and his Executors, and no assignment nor acceptance of the rent by the hands of the assignee, shall take from him the advantage of suing him or his Executors upon an express Covenant, No more than if a Lessee had obliged himself in an obligation to pay his rent, his assignment over of his term and the acceptance of the rent by the Lessor, of the Assignee, shall not take from him the advantage of the obligation. See for this, the case of Brett against Cumberland. Secondly, It was moved, That this declaration was not good, Because it is by such an Indenture, Testatum existit, and he doth not say expressly, That dimisit & convenit. And compared it to the case of Browning and Beston, Plowd. 141. Where it is Continetur in tali Indentura, &c. Et 2. Ed. 4. 21. But all the Court conceived, It is good enough; and the usual course in this Court is to declare in this manner, That by such an Indenture Testatum existit, &c. Thirdly, Because it is declared that he demised messuagi-

um

um five tenementum, which is uncertaın, sed non allocatur : For true it is, that so it ought not to be in an Ejectione firmæ, or an Endowment upon the Statute of 8. Hen. 6. wherein he is to have possession : But here it is only a recital of the words of the Lease, and to have damages only : Whereupon it was adjudged for the Plaintiff.

Bethyl *versus* Parry.

9.
Error of a Judgement in Carnarven. The Error assigned was, because that in 12. Jac. a Venire facias was returned in this manner, Per *Thomam Ravenscroft* Vicecomitem. Istud Breve cum pannello annexo mihi deliberat. fuit, per *Thomam Hanmer* Militem, nuper Vicecomit. in exitu ab officio suo. Et sic indorsatur, Thomas Hanmer Miles, nuper Vicecomes, which is not good ; For it appears that it was returned by one who had no authority, for in saying nuper Vicecomes, excludes him, That he was not Sheriff when he made the return : And then it is without authority, and as no return, or as if it had been returned with a blank ; for then it should be ill by the Statute of York 12. Ed. 2. cap. 5. Before the Statute of 21. Jac. which aides such returns after Verdict, Vide Co. lib. 5. fol. 41. The case betwixt Rowland and James, where, by reason of a blank returned, The tryal was held ill, but Hide, Jones and myself held, That it was good enough ; For it appears by the Record, That he was Sheriff next before Thomas Ravenscroft ; For the Plaintiff, at the Assises in July before, put in his challenge, That Thomas Hanmer, then Sheriff, was Cousin to him, and shewed how ; and therefore prayed a Venire facias to the Coroners, and the Defendant denyed the Cousinage : wherefore the Venire facias was awarded to the Sheriff. And then when, in exitu officii sui, he delivered that Writ, returned Thomas Hanmer Miles, It is sufficient to satisfy the Statute ; For he needed not alledge his name of Office ; For at the Common-Law, it was good without returning his name thereto. Now the Statute appoints, That he who returns, shall add his name to the return, which is sufficient, if it be his christian and surname, And his name of Office is not requisite, as Plow. fol. 63. Dive and Manningshams case. Then being returned by him, and his name to it, The addition of nuper Vicecomes (for it shall not be intended, That he returned it when he was not Sheriff, but that he returned it when he was Sheriff, and made that addition when he delivered it to the new Sheriff) shall not make the return void : And divers presidents were shewn, where they were returned in the same manner. All which should be reversed if there should be a reversal hereof, And when by any way or construction the Court may intend it to be good, They so shall intend it. And, as it was agreed, That this word nuper Vicecomes both necessarily imply, that he was not then Sheriff, at the time

time of the delibery of the Writ to the new Sheriff: So it is to be construed, That by the word *nuper* Vicecomes he was Sheriff at the time of the Panell made. And if he had returned it without those words, *nuper* Vicecomes, it had been clearly good, Then the addition thereof shall not make it ill. But Justice Whidlock seemed to doubt thereof, wherefore the Court would further advise.

Shepheards Case.

10. **T**RESPASS of his Closs breaking. The Defendant justifies, because it was the freehold of J. S. and he entred by his command. The Plaintiff intitles himself, because the place where, is customary Land, parcel of such a Manor, whereof J. S. is seized in Fee, &c. and demisable by Copy at will in Fee; And that J. N. was thereof seized in Fee by Copy, at the will of the Lord of the Manor, according to the custome, &c. and dyed seized; so as it descended to two daughters, as heirs of the said J. N. And that at such a Court, Dominus concessit eis, extra manus suas, &c. Habendum & tenendum tenementa prædicta, to the said daughters and their heirs, whereby they were seized in Fee, and demised to the Plaintiff for years. And Issue being joyned upon a collateral matter, & the verdict given for the Plaintiff, it was moved in arrest of Judgement, That the Plaintiff had not made a good Title; for none may intitle himself to any Copyhold, But he ought to shew a grant thereof: And therefore he shewing such a one was seized in Fee, without shewing the Grant thereof, 'twas not good. And of that opinion was all the Court, That it was no good manner of pleading: But Hide, Jones, and Whidlock conceived, It was but a default in the form; and the issue being taken upon a collateral matter, and found for the Plaintiff, it is helped by the Statute of Jeofays; whereupon it was adjudged for the Plaintiff.

Nash *versus* Preston.

11. **A** Bill in Chancery was referred to Justice Jones and my self, to consider, Whether one should be relieved against Dower, demanded, &c. where the case appeared to be, That J. S. seized in Fee by Indenture inrolled, bargains and sells to the Husband for one hundred and twenty pounds, in consideration, That he shall redemise it to him and his Wife for their lives, rendring a pepper Corn; And with a condition, That if he paid the hundred and twenty pounds at the end of twenty years, the bargain and sale shall be void. He redemiseth it accordingly, and dyes: His Wife brings Dower. Whether

ther the Plaintiff shall be relieved against this title of *Dower*, was the question? And, although we conceived it to be against equity and the agreement of the Husband at the time of the purchase, That she should have it against the Lessees: For it was intended, they should have it redeemed immediately unto them, as soon as they parted with it; and it is but in nature of a Mortgage. And upon a mortgage if Land be redeemed, The Wife of the Mortgagee shall not have Dower. And if a Husband takes a Fine *sur cognisance de droit come ceo, and renders arrear*; Although it was once the Husbands, yet his Wife shall not have Dower: For it is in him and out of him *quasi uno flatu*, and by one and the same Act. Yet in this case we conceived, That by the Law she is to have Dower: For, by the bargain and sale, the Land is vested in the Husband, and thereby his Wife intitled to have Dower. And when he redemises it upon the former agreement, yet the Lessees are to receive it subject to this title of Dower; And it was his folly, that he did not conjoyn another with the Bargainee, as it is the ancient course in Mortgages. And when she is Dowable by Act or Rule in Law, a Court of Equity shall not barr her to claim her Dower; For it is against the Rule of Law, *Where no Fraud or Covyn is, a Court of Equity will not relieve*. And upon conference with other the Justices at *Serjeants Inne*, upon this question; who were of the same judgement, we certified our opinion to the Court of Chancery, That the Wife of the Bargainee was to have Dower, And that a Court of Equity ought not to preclude her thereof.

Termino

Termino Trinitatis, anno sexto *Caroli* Regis,
in Banco Regis.

Taylor *versus* Starkey, Hill. 5. Car. rot. 385.

1. **E**Rror of a Judgement in the Common-Bench, in an Action upon the Case for words. Whereas the Plaintiff was, and is an Attorny of the Common-Bench; That the Defendant, the first of June quarto *Caroli* spake of the foresaid Plaintiff these words, He is a common Barretor, a Judas, a Promoter; And primo Julii quarto *Caroli*, spake these words of the Plaintiff, He is a common Barretor, a Cheater, and I will make him to be barred of his Practice. The Defendant pleaded Non culp, and found against him for the first words, and damages to fifty pounds: And Non culp for the words supposed to be spoken primo Julii quarto *Caroli*: And Judgement being given for the Plaintiff, as to the first words, and the fifty pounds damages; and for the Defendant, for the second words, it was assigned for Error by Taylor of Lincolns Inn, That an Action lies not. For if it were spoken of a common person who was not an Officer, That he is a common Barretor, an Action lies not, and so adjudged in this Court decimo nono Jacobi. And here, although he be an Attorny who brings this Action, yet not appearing there was any such speech of him as Attorny, or to scandalize him in his place, the words are spoken of him as of a common person; For the last words which concern his Practice the Defendant is found Non culp. But all the Court conceived the Action well lies; for it is a great slander to an Attorny to be called and accounted a common Barretor, who is a maintainer of Babbles and Quarrels, and a Quarreller and Fighter; And words are to be construed secundum conditionem personarum of whom they are spoken; Whereupon the Judgement was affirmed.

Johns and Robinson *versus* Dodsworth.

2. **E**Rror of a Judgement in an Appeal of *Maihem* in Durham: The Error assigned, Because the Plaintiff declaring there, in an Appeal against them, That they, with a third, made the *Maihem*: They pleaded several Pleas, whereupon several Issues were joyned, and Verdict for the Plaintiff, and against Johns upon the Cryal fifty pounds damages were found, and against Robinson one hundred pounds damages; And the Plaintiff prayed Judgement

ment against both, for the one hundred pounds damages and costs, and had it; And now Error is brought and Assigned, Because the Plaintiff hath Judgement for the one hundred pounds damages, and doth not release the damages for the fifty pounds. But the Court conceived it to be no Error; For the Judgement being for the one hundred pounds by the election of the Plaintiff, it is a Wayver of the other damages, and he cannot have both; therefore he needs not release the damages of fifty pounds; Whereupon the Judgement was affirmed.

Simonds versus Mewdesworth, Hill. 3. Car. rot. 378.

DEbt. Upon an Obligation quinto Octobris decimo septimo Jacobi, of three hundred pounds conditioned, for the payment of two hundred and ninety pounds in April following: The Defendant pleaded, That in December, decimo septimo Jacobi, by Indenture, It was agreed betwixt the Plaintiff, and divers other Creditors of the Defendants (to whom the Defendant was indebted in divers and several summs of money particularly mentioned) That the Defendant by Indenture of bargain and sale, should assure divers Lands in the County of Lincoln, to nine of the Creditors, to be sold by them, and the money to be paid amongst the Creditors, and assigned to them a Lease for years of the customs of Wines, and certain other summs of money which the said Creditors by the said Indenture accepted, and alledges in fact, That he by Indenture, bargained and sold the said Land to the said nine persons, & made a Letter of Attorney to receive the summs of money; And thereupon the Plaintiff demurs, Because that the Indenture sounds in nature of a Covenant; and if so, it shall not be in satisfaction, being in it self no satisfaction, nor pleadable in satisfaction of that Debt: Also admitting it had been a good satisfaction, if performed, yet part thereof not being performed, it is clearly no barr to this Action; Whereupon it was adjudged for the Plaintiff; For agreement without satisfaction is to no purpose.

3.

Sands versus Trevilian, Mich. 4. Car. rot. 196.

Error of a Judgement in C. B. where, Trevilian being Attorney, brought an Attachment of priviledge against Sands, and demanded against him debt of ten pounds, and declares, That he being an Attorney there, the said Sands retained him to prosecute a Suit in the Common-Bench betwixt one Symms and Worlich, and desired the Plaintiff to be Attorney for Worlich, and promised to pay him all his fees, and all that he should lay out to Counsel and Officers of the Court in that Suit, and shews, That he laid out such summs, which amount to the money demanded; whereupon he brought this Action. The Defendant there pleaded Nil debet, and found against him, and Judgement for the Plaintiff;

4.

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And

And now Error assigned, That in this Case debt lies not against him who so intreated him to be Attorny; for there is no contract between them, nor hath he any quid pro quo; But he ought to have had an Assumpsit (because he did it at his request) if he, for whom he is retained, doth not pay him his fees: And thereto agreed all the Court; but if he should have debt they doubted: But Rolls for the Defendant, in the Writ of Error, shewed, That he well might bring an Action of Debt, because he retained him, which is a consideration in it self; And he relied upon 37. Hen. 6. 10. If one intreat a Carpenter to make such a thing for another, or to serve another for such a time, and promiseth him ten pounds, debt lies: So 17. Ed. 4. 5. If one promise one hundred pounds if he will marry his Daughter, he marries at his request, &c. And he shewed a president, 16. Jac. rot. 4 16. betwixt Bradford and Woodhouse, wherein it was adjudged and affirmed in a Writ of Error, That Debt lies; and he said there was a difference where one is retained generally for another with such a promise to pay his fees, and as much as he should expend in the Suit, there Debt lies: But if I retain one to be Attorny for another, and promise if the other doth not pay, That I will pay; there if the party, for whom the Retainer is, doth not pay, an Action of the Case lies against me upon my promise, and not an Action of Debt; but here an Action of Debt lies. But all the Court conceived, That no Action of Debt lies here, but an Action upon the Case only: For the Retainer being for another man, and he being Attorny for another man, who agreed to that Retainer, there is no cause of Debt betwixt him who retained and the Attorny, and no contract nor consideration to ground this Action; and he who is so retained, may well have debt for his fees against him, for whom he was retained, he having agreed thereto, wherein there cannot be any Wager of Law, but against the Defendant, who is a Stranger to the Suit, and at whose request he took upon him to be Attorny, Debt lies not, as 27. Hen. 8. 24. and in the Case Hill. 38. Eliz. Rolls versus Germyn 'twas resolved; Whereupon it was adjudged, That the first Judgement should be reversed And Richardson, chief Justice of the Common-Bench, and Hutton and Harvie Justices of the Common Bench, being moved herein, said, That this point was never moved before them; And they were of the same opinion That Debt lies not, but only an Action upon the Case. Ante pag. 107.

Poynter *vs* Poynter.

5.

Assumpsit. Whereas the Plaintiff and Defendant having communication, That the Plaintiff should espouse the Daughter of the Defendant; The Defendant promised, if the Plaintiff ad instantiam Defendantis would marry the Defendants Daughter, he would pay unto him twenty pounds, and give unto him twenty french pices towards their Wedding Dinner; And alledges

alleges in fact, That he married the Defendants Daughter, and had required him to pay the said twenty pounds, and that he had not paid it, And that the twenty French pieces amounted to six pounds English money, and the Defendant had not paid them. Upon Non Assumpſit pleaded, and found for the Plaintiff, it was moved by Berkley Serjeant in arrest of Judgement, That the Declaration is not good; for the promise is but conditional, if he ad instantiam of the Defendant, married his Daughter, &c. and he alleges, That he married the Defendants Daughter, but he doth not say ad instantiam Defendantis: So it being a Condition precedent, if he hath not abetted performance thereof, there is no cause of Action. But all the Court conceived, upon this agreement, to marry the Daughter ad instantiam Defendantis, and he marrying her, it shall be intended to be ad instantiam defendantis, without abetting, That he after, at the instance of the Defendant, married her. A second Exception was, Because the promise is, To give unto him twenty French pieces, that is not twenty French Crowns; for there may be other pieces, sed non allocatur; For French Crowns are the common Coyne of France, and here known, And it shall be intended according to our usual speech; Whereupon it was adjudged for the Plaintiff.

Harlow *versus* Wright.

DEbt. Upon an Obligation conditioned, That if the Obligor his Executors and Assigns, from the time of the Obligation, may enjoy such Land by virtue of such a Lease made unto him by the Obligor, That then, &c. The Defendant pleads, That post Obligationem, until the day of the Bill, the Plaintiff had enjoyed that Land. Upon this Plea the Plaintiff demurs. The first Exception was, Because the Defendant doth not say a die confectionis scripti obligatorii, & semper post confectionem scripti obligatorii; For it may be the Plaintiff enjoyed it post confectionem scripti obligatorii, but non semper post; sed non allocatur; For a Barr is good to a common intent, and it shall be taken, That he alwayes enjoyed it unless the contrary be shewn, which must come on the Plaintiffs part. A second Exception was, Because the Defendant did not plead, That the Plaintiff and his Assigns enjoyed it according to the words of the Condition; and it was said, That the Plaintiff had in truth made an Assignment, sed non allocatur; for it shall not be intended the Plaintiff had made an Assignment, unless he himself shews it, And it ought to be shewn on his part; Whereupon rule was given, That Judgement should be entered for the Defendant. But it was moved to have the Plaintiff discontinue his Suit, for otherwise he should be barred of his debt, whereas he had good cause of Action: So the Court adjourned it until the next Term, that in the interim he might discontinue.

6.

Salmon *versus* Percivall.

7. **T**Respafs of battery, wounding, and imprisonment. The Defendant quoad wounding pleads Non culp: Quoad the battery and imprisonment justifies; Because, being a Serjeant of the Mace in London, by custom there upon a Plaint of Debt entred in any of the Counters against any, he may arrest him against whom such Plaint is entred, and carry him to prison, until he find Bayl; And justifies by reason of a Plaint entred, &c. The Plaintiff replies, That after the arrest, he tendered unto him sufficient Bayl, viz. J. S. and J. D. and notwithstanding he detained him in Prison, &c. Et hoc, &c. The Defendant takes issue, That he did not tender him Bayl, And it was found against him for both Issues, and entire damages given, And moved in arrest of Judgement, That having justified the Arrest and Imprisonment, the tender of Bayl is not material; for he is not the party who ought to accept Bayl, but the Judge in Court: therefore the Issue as to this point is frivolous. And although Germin, for the Plaintiff, objected, that because he refused to take Bayl, he was a Trespasser ab initio, As he who enters into a Tavern and takes a Cup away; Or where Tenant at will pulls down the house; yet all the Court conceived, That when he justifies the Arrest and Imprisonment, although he might have accepted Bayl (which they all agreed, he could not) and refused, that doth not make the Arrest and Imprisonment tortious, to have Trespafs; But he might upon the matter have had an Action upon the case for detaining him in Prison, after Bayl tendered, Then when damages are given as well for the Battery and Imprisonment, as for the Wounding, the Plaintiff ought not to recover; Whereupon it was adjudged for the Defendant.

Dow and others *versus* Golding, Hill. 5. Car. rot. 125.

8. **T**Respafs *sur* Demurrer. The question was, Whether the Lord of a Manor may assess two years and half value of Copyhold land according to rackd rent for a fine, upon surrendor and admittance, & for non payment enter for forfeiture? And all the Court conceived, That one year and a half of rent improbed, is high enough; and the Defendant assessing two years and a half, it is unreasonable; and therefore the Plaintiff might well refuse the payment thereof, and consequently the entry of the Defendant for a forfeiture not justifiable; Whereupon it was adjudged for the Plaintiff.

Hughs Case.

9. **H**ughes being taken upon an Excommunicato Capiendo, Because he was condemned in the Court of the Vice-Chancellor of Oxford in costs, and had not paid them; the Writ of Excommunicato

nicato Capiendo being awarded upon a Significavit, returned into Chancery and delibered here into Court, according to the Statute of quinto Elizabethæ cap. 23. he being arrested thereupon, exception was taken because it is not expressed to be for some of the causes mentioned in the Statute of quinto Elizabethæ, and so void. And it was demurred thereupon. And Littleton moved, That although the Significavit doth not mention any of the causes in the Statute, but is for other causes (viz. for Tolls) yet the Excommunication is good. But if any Capias with Proclamations and penalties therein be awarded, these penalties and forfeitures be void, unless the Significavit express it to be for one of the causes mentioned in the said Statute. But the Excommunication it self is good enough. And so, tertio Caroli, it was resolved in this Court upon long deliberation and debate, in the Case of one Brown, Although some while before, upon suddain motion and not well observing the words of the Statute, some had been discharged of such Excommunicato Capiendo: And Jones and Hide said, they well remembred Browns Case to be so resolved. But none being there of the part of Hughs they gave further day to be advised thereof.

Lord Brook *versus* Lord Goring.

UPon the Lord Keepers request, All the Justices and Barons were assembled for their resolution in the Case betwixt the Lord Brooks and the Lord Goring, which was thus. Queen Elizabeth, anno decimo nono Regni, granted to Fulk Grevill Esquire, the Office of the Clerk of the Council of the Marches of Wales for his life; and by another Patent, anno vicesimo quinto Elizabethæ, granted unto him the office of Secretary there, for his life: And in primo Jacobi Regis, without recital of these Patents, the said King grants the said offices to Sir Fulk Grevill, then Knight, for his life: And after, in nono Jacobi, the King, reciting the said Patent of primo Jacobi, grants those offices to Adam Newton for his life, when, after the death, surrender, or forfeiture of the said Sir Fulk Grevill, they should become void. And after, in decimo quarto Jacobi, by another Patent, reciting the Patents of primo & nono Jacobi, and omitting the Grants in decimo nono & vicesimo quinto Elizabethæ, the said King granted the said offices to John Venor and John Mallet, Habendum for their lives, cum post mortem of the said Fulk Grevill or Adam Newton, surrender, forfeiture, or other determination, vel alio quocunque modo, the said offices should be void, or should come to the Kings hand to dispose, with a Non obstante a male nominando, or a male recitando prædicta officia; Et non obstante male recitando, male nominando, vel non recitando, aliquod donum vel concessionem præantea factum de officiis prædictis. And whether the Patent of decimo quarto Jacobi be good, or not, was the question? And it was argued several dayes, viz. by Hedley Serjeant against the Patent decimo quarto Jacobi, and by Noy for the Patent. And at another

ther day by *Banks* against the Patent, and by *Finch* Serjeant for the Patent. And it was agreed by all the Justices and Barons, That the Patent of *primo Jacobi* was meerly void ; For first it was agreed by the Counsel of each side, That the Patents of *decimo nono & vicesimo quinto Elizabethæ* were good and nothing objected against them. Then Sir *Fulk Grevill*, being the Patentee, and alive, and he accepting a new Patent in *primo Jacobi*, without reciting the former Patents, and not any *Non obstante* therein, It is cleerly void ; as it was agreed in *Harris and Wings Case*, That if Lessee for years of the Queen take a new Lease for years of the same thing, without recital of the former Lease, it is meerly a void Lease, and no surrender of the former Lease : And it is stronger in this Case ; For the grant of an office cannot be surrendered by the taking of a second Grant ; for there is not any revocation thereof. Secondly, It was agreed by all the Justices and Barons, That the Patent of *nono Jacobi*, reciting the Patent of *primo Jacobi* as a good Grant, which is void, and no *Non obstante* therein, This Grant is meerly void. Thirdly, The principal question was, Whether the clauses of *Non obstante* in the Patent of *decimo quarto Jacobi* makes it good (For otherwise, without a *Non obstante*, it was agreed by them all, That it was void) because it recites the two Patents which are void, and omits the recital of the two Patents which are good : And makes the *Habendum* after the death or determination of the said Patentees, which are void ; So the King is deceived in his Grant, and mis-informed ? And whether the *Non obstante* doth help it, was the principal question ? And as to that point *Hide* chief-Justice held cleerly, That the *Non obstante* helps it and makes it a good Patent, because the King relinquisheth the advantage of *non recital or false recital*, and intends to grant it by whatsoever means the same shall become void : And *Jones* seemed to doubt thereof, and would not deliver any opinion therein : But *Richardson*, chief Justice of the Common Bench, *Hutton*, *Harvey*, and *Dampart*, Justices of the Common Bench, *Denham*, *Trevor*, and *Vernon*, Barons of the Exchequer, *Whitlock* and *my self*, Justices of the Kings Bench, conceived, That this Patent of *decimo quarto Jacobi* is meerly void, by reason of those misrecitals ; which are not properly misrecitals or false recitals, but rather false informations or suggestions, whereby the King was deceived. For by intendment, The King conceived those Grants were good, which are void, And granted those Offices after the determination of the said Grants, *vel alio quocunque modo, &c.* So the King is deceived, and the *Non obstante* shall not aid such false informations and false suggestions. *Co. 6. lib. 4. fol. 35. sur Chandoy's case; 3. Eliz. Dyer 147. Blagues case.* But there was not any Certificate made of these Judges opinions, because the parties compounded.

The King and Codrington *versus* Rodman.

11. **E**Xcommunicatio Capiendo, upon a sentence in the Delegates, for costs in castigatione Morum. The Sentence being before, vice-simo

simo primo Jacobi, divers Capias, with Proclamations and penalties, issued, according to the Statute of quinto Elizabethæ. And the Defendant, being now taken, pleaded, quoad all the penalties and forfeitures, That it is not for any of the causes within the Statute; therefore quoad them he ought to be discharged: And so it was held by all the Court. Quoad the Excommunicato Capiendo he pleaded, That the said offence and contempt, for which the Excommunication was awarded, was before 21. Jac. and pleads the general Pardon of vicesimo primo Jacobi in discharge thereof: And it was thereupon demurred. And now Germin for the Plaintiff moved, That this Excommunication, being for costs taxed for the party, the party having interest in the costs, being taxed before the Pardon, the general Pardon shall not take away the costs (which was agreed by the Court:) For a private person being interested in them, the Pardon shall not take them away. Then Germyn moved, That as the Costs were not taken away, so no more is the Excommunication, which is the means to enforce them to be paid; and it is as an Execution at the Common-Law, and shall not be discharged. But Grimston for the Defendant moved, That this Excommunication before the Pardon, is but for a contempt to the Court, And all contempts are discharged as contempts in Chancery, Star-Chamber, and other Courts are discharged, by the general Pardon, not being excepted therein, Co. lib. 8. fol. 69. Trollops Case. And all the Court (absente Hide, chief Justice) conceived. That this Excommunication is discharged by the Pardon; and all contempts before the Pardon are discharged, and all the Sentences for the crime; except only the Costs, for the payment of which, he ought to have new Process. But the Court would advise thereof afterwards, viz. Pasc. 7. Car. being moved again, and president shewn in Court, Mich. 2 Car. rot. 64. where it was adjudged to be discharged: It was so adjudged here likewise.

Smart *versus* Doctor Easdale:

Action for words. Thou wast perjured, and hast much to answer for it before God. Exception after verdict in arrest of Judgement, For that it is not, That he spake it in auditu complurimorum, or of any one according to the usual form. Secondly, That the words Thou wast perjured, is in the time past, and is extenuated by the subsequent words; quasi diceret, although not answerable before men, yet before God; sed non allocatur: For it is not material how long since it was spoken, for the fault remains. And it being found by verdict that he spake them, it is not material although he doth not say in auditu plurimorum; Whereupon it was adjudged for the Plaintiff.

12.

Termينو Michaelis, anno sexto *Caroli* Regis,
in Banco Regis.

1. **M**emorandum, That the three last Returns, viz. *Ostabis Quindena*, and *Tres Michael*. of this Term were adjourned by a Writ of Adjournment directed to the Justices of every Court. And whereas it was my turn, being the *puisny* Judge, to keep the *Essoynes*, Justice *Fones* being at his house in *Holborn* for other business, went the first day of *Ostabis Michaelis* to *Westminster*, and before him the Writ was read of Adjournment of all the said returns, and he adjourned the Term, for the Kings Bench: And Justice *Dampart*, *puisny* Judge of the Common Bench, adjourned the Term in the Common Bench; And Baron *Vernon*, in the Exchequer. And the day of *Essoyns* of *Mense Michaelis* being 27. of *October*, I kept the *Essoyns* for the Kings Bench; and Justice *Dampart* for the Common Bench; and Baron *Sotherston* for the Exchequer, and did no more the same day: And none of the Justices of the Kings Bench or Common Bench sate, nor the Lord Keeper in the Chancery, untill *quarto die post*, which was *die Sabat*. 30. *Octob*. And because the Major of *London* was to be sworn in the Exchequer by Ancient usage *Crasino post festum sanctorum Simonis & Juda*, the Lord Treasurer and Barons of the Exchequer sate in the Exchequer 29. *Octob*. and there the Major was sworn; but no great feast for the Major according to the ancient usage, was kept, the Plague being in *London*, and great scarcity of Corn that year; for which causes by Proclamation, the feasts of the Companies in *London* were prohibited,

Hulm versus Heylock, ante pag. 129.

2. **E**jectione firmæ, upon a Lease made by Henry Green of land in Old-street. Upon evidence at the Barr the Case was, John Mercall seized of the land in question, devised it to John Gallant an Infant, of the age of three years, in fee, by the name of his Tenement called the White-Swan, and dyed. Henry Mercall, the son and heir of John Mercall, enters and levies a Fine thereof in decimo sexto Jacobi with Proclamations in the life of John Gallant, being within age; who after dyed, being within age, the wife of Heylock being his sister and heir. The question was moved by Germin, That this Fine, although five years passed without claim, shall not hurt the said Heylocks wife (especially being she was a *Feme covert*) Because she claimed by a devise; And before entry the fine is levied; so as her estate was not turned into a right, as it hath been resolved, That if one enters after a Devise, before the Devise enters,

ters, and dyes seised, that discent shall not take away the entry: So that Fine and Nonclaim shall not barr where it is not turned into a right. But all the Court conceived, although a discent in that case shall not bind; for then they might not maintain any Action never having had any seisin, and so they should be without remedy, where there is only a discent and no binding matter of barr; yet a Fine and Nonclaim, which is a binding Law, shall barr the *Baron* (who suffered the five years to pass) and all claiming under him and the *Feme* her self, during the *Coberture*; But the *Feme* shall have new five years after the death of the *Baron*. And so they delibered the Law to be, to the Jury.

Endicament of forcible Entry in *Cythes*: Where the party *ousted* prays restitution: And whether this Endicament were maintainable, was the question: For it was agreed, That an *Assise* lyes of *Cythes* by the Statute of *tricesimo secundo Henrici octavi*, and they be recoverable as a Lay Inheritance. And *Calthrop* moved, That the Endicaments should be allowed, as well for *Cythes* as for *Rent*: And for *Rent* it appears that forcible Entry lyes, by *Fitz. Herb. Nat. brev. 49. 20. H. 6. 11. & 22. H. 6. 23.* And afterward, absente *Hide*, Writ of restitution was granted.

Levanne Case.

Samuel Levanne, Administrator of Mary Levanne his sister, was Sued in the Spiritual Court in London before the Ordinary, to make distribution of the goods of the Intestate, pretending all the debts of the Intestate, and all Legacies were discharged, and a great surplusage remaining, which was disposable at the pleasure of the Ordinary, and to be divided among the friends of the Intestate. And for this cause Banks, the Princes Attorney, moved for a Prohibition: For by the Statutes of *tricesimo Edwardi tertii*, & *vicessimo primo Henrici octavi*, Administration is appointed to be committed to the nearest and faithfullest friends: which being committed, the Ordinary hath no authority to meddle with him to make distribution: For he is as an Executor to sue and to be sued, and to dispose of the Goods of the Intestate, as freely as an Executor might where there is a Testament. And it would be an inconvenience to compell him to make distribution: For if afterwards other debts should be discovered, or if he be sued for breach of Covenants, the Administrator should be compelled to answer of his own Goods; and therefore it is reason he should keep the Intestates Goods, to save himself harmless against such suits. Germin for the Plaintiff in the Spiritual Court moved, That no Prohibition should be granted: For it is reason, when there is surplusage, (it being averred that all Legacies and Debts are satisfied,) that the Administrator should not retain them to his own use, But that they should be distributed amongst the friends of the Intestate: And the

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Ordinary

Ordinary will take security, that if debts be discovered afterwards, there shall be restitution of the Goods to the Administrator as much as will satisfie. But all the Court resolved that a Prohibition was well grantable, Because the absolute interest in the Goods is in the Administrator: And the Administration being committed, the Ordinary hath nothing to do: And he cannot now, as he might at the Common Law, repeal the Administration committed at his pleasure: And it shall not be left to his discretion to provide restitution for debts discovered, for that might be inconvenient: Whereupon a Prohibition was granted. See before Fortherbeys Case, Hill. 2. Car. C. B. pag. 62.

Pilchard *versus* Kingston.

5. **A** Stumpfit. Whereas the Defendant having communication with the Plaintiff for the Marriage of one Margery, affirmed that her portion was 600 l. The Defendant in consideration that he would marry the said Margery and assume that such land should be assured unto her for her Joynture, promised the Plaintiff that he would pay unto him 100 l. & firmam faceret to him the said portion of 600 l. That he, at the request of the Defendant, espoused the said Margery; And that the Defendant had not paid the 100 l. nec firmam faceret to him the said portion of 600 l. The Defendant pleaded non Assumpfit, which was found for the Plaintiff. And moved by Grimston in arrest of Judgement, That the Declaration was not good, Because the Plaintiff hath not shewn, that he might not have the said portion, or that the said Margery had not such a portion: For it may be the said Margery had such a portion in her own hands, or in good debts; and the Defendant did not promise to pay, but to make good the portion; which is performed, if she hath such a portion: And therefore the Plaintiff ought to shew what he wants thereof. And such allegation, That he firmam faceret portionem, is not good. But all the Court held, That the Declaration was good enough; For it pursues the words of the Assumpfit in the breach alledged: And these words *sunt amount*, that he would warrant, that he should have such a portion with his wife. And he pleads non Assumpfit: And the Jury found damages; which intends, That they gave damages for so much as was wanting, according to their evidence: Whereupon it was adjudged for the Plaintiff.

Downs *versus* Winterflood.

6. **A** Traint. One of the Jurors was returned by the name of Alexander Prescott. In the Resummons (which was in nature of a Distringas) it was Alexandrus Prescott, and he was sworn by that name: And the verdict of the Petit Jury was affirmed by them. And it was moved in arrest of Judgement, That this was tried

tried by a wrong person, and therefore the Verdict ill, and not aided by any Statute: But the Sheriff and the said Juroz being examined in Court, it appears, That Alexander Prescott was his true name, and that he was the Juroz intended to be returned and truly sworn, And that there was not any known by the name of Alexander Prescott in the same Town; And if it should be amended as the Disposition of the Clerk, by the Statute of vicesimo primo Jacobi, was the question? And it was clearly resolved, That it is not to be aided by the Statute of vicesimo primo Jacobi; for that extends only to the surnames of the Juroz, or where their additions are mistaken, in which cases if by examination it may appear that he is the same person intended to be returned: The Statute aids that, but not where a Christian name is, &c. And for staying the amendment, the Counsel relied upon the Case in Coke lib. 5. fol. 42. betwixt Goldwell and Parker, where Paulus Cheak was returned in the Venire, and the Distringas was Paulus Cheak, which was his true name, yet it cannot be amended, and the Record thereof which was Mic. 33. & 34. Eliz. rot. 419. was shewn in Court, where it appears, That for this cause the Verdict was quashed, and a Venire facias de novo awarded: But note, the Disposition was in the return of the Venire facias, which was the first process and return; but here in the second, which ought to be guided by the former process; Therefore the Court doubted thereof, Et Adjournatur.

Memorandum, That the eighteenth of November 1630 in this Term, John Walter Knight, the chief Baron died at Sericants-Inne, being a profound learned man, and of great integrity and courage, who being Lord Chief Baron by Patent *primo Caroli*; *quamdiu se bene gesserit*, being in the Kings displeasure, and commanded, That he should forbear the exercising of his Judicial place in Court, never exercised his place in Court, from the beginning of Michaelmas Term *quinto Caroli* until this day; And because he had that Office *quamdiu se bene gesserit*, he would not leave his place, nor surrender his Patent, without a *Scire facias*, to shew what cause there was to determine his Patent, or to forfeit it; so that he continued chief Baron until the day of his death. But it appears, That the Judges of both Benches are made only *durante bene placito Regis*, so as they are determinable at the Kings pleasure.

7.

Aquila Weeks Case.

Aquila Weeks, Keeper of the Gatehouse, was sued in an Action upon the Case, for suffering J. S. to escape, who was in execution upon a Judgement, Trin. 2. Car. He pleaded Non culp. in London, and it was found by Nisi prius; And because the Record of the Nisi prius mentions the Judgement to be Trin. 3. Caroli,

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which was a misprision of the Record, the Plaintiff was non-suited: And now it was moved by Germin for the Plaintiff, That by reason of this misprision, the Record of the Nisi prius is not warranted by the Roll, and the Non-suit thereupon being Null, the Postea shall not be recorded nor entered; For there is no warrant for this Record of Nisi prius; Wherefore it was prayed, That a Distingas de novo might be awarded, and upon shewing of two presidents in this Court, a Distingas de novo was awarded.

Crowle versus Dawson.

9. **D**Ebt. Upon an Obligation conditioned, That whereas the Defendant should marry such a Widow, who was possessor of divers goods which were her first husbands and the goods of his Children, That her husband should not meddle with them, but that she and her Children might enjoy them without disturbance, claim, or interruption of the Defendant, or any claiming by him: The Defendant pleads performance of the Covenants and Agreements generally, The Plaintiff assigns for breach, That the said first husband was possessed of such sheep and goods, And that the Wife had them before Marriage, And that such a day after the Marriage, the Defendant, her now husband, took the said goods into his hands, and then detained, and yet detains: And Issue thereupon and found for the Plaintiff; And moved in arrest of Judgement, That this is no sufficient breach; for he doth not shew, That the husband made any act or disturbance; for by the Inter-marriage, the goods are in the husband; and it is not shewn, That he disturbed the Wife to enjoy them; and of that opinion were Hide and Jones, But Justice Whiclock and my self conceived otherwise, And that the breach is well assigned; for by the Allegation, That he took the said goods into his hands and detained them, is supposed, if not a forcible, yet at least a taking and detaining of them from the Wife. And issue being joyned and found for the Plaintiff, the Court intends not but that it was an unjust *caption & detention* contrary to the Agreement; and afterward Hide, *mutata opinione* upon the reading of the books, was of the same opinion; Whereupon, absente Jones, it was adjudged for the Plaintiff.

King versus Lorde, Hill. 5. Car. rot. 795.

10. **E**jectione firmæ of a Lease of the Lady Pagetts. Upon a Special Verdict the Case was. Lettice Knowls Copyholder for life, surrenders in consideration of twenty pounds to the use of one Dorothy Whytler; the Lord accepts the surrender, and grants it to Dorothy Whytler for her life, who was admitted accordingly, and dyes: Lettice Knowls being alive, claiming it as her former Estate, lets it to the Defendant, and the Lord enters; and lets to the Plaintiff:

Plaintiff: And upon this Verdict, Whistler for the Defendant argued, That when a Coppelholder for life surrenders to the use of another, who is admitted, the first Coppelholder hath quasi a possibility or Remainder of an Estate, That if he surbive him, to whose use the surrender is made, That he shall have it again. But he agreed, That if a Coppelholder for life surrendred his Estate to the intent, That the Lord should grant it to whomsoever he pleased, then his Estate was drowned, but not here; And for that he relied upon the Book, 9. Eliz. Dy. 264. But all the Court conceived he may not have it again, But that her Estate is merely determined by the surrender, And that there is no difference as to that purpose, to surrender all her Estate to the use of one, and to surrender generally; and the Book of 9. Eliz. Dy. 264. doth not warrant such a difference. For if a Tenant for life surrender to the use of another, and the Lord grants it, he is merely in by the Lord, and not by the Coppelholder who surrendred: But if a Coppelholder in fee surrender to the use of another for life who is admitted, he is in quasi by the Coppelholder, and by his death the Coppelholder shall have it again, but not here; Whereupon it was adjudged for the Plaintiff.

Note. This Judgement was impeached by a Writ of Error, and the matter in Law assigned for Error, And by all the Justices of the Common Bench and Barons of the Exchequer, the Judgement was affirmed.

The Lord Savills Case.

SIR Thomas Savill was sued in the Common-Bench in Trespasse of Assault, Battery, and Wounding, and found for the Plaintiff, and damages assessed to three thousand pounds; and Judgement being there for the Plaintiff, Error was brought and assigned: But upon examination of the Record, there was no material Error; whereupon Judgement was affirmed by the rule of the Court: But before entry of the Judgement Sir Thomas Savill procured a Writ out of the Chancery, directed to the Justices of the Kings Bench, & quibuscunque interesset, wherein he shews to the Court, That Sir John Savill his Father was created Baron for his life, and after the Barony was limited to the said Sir Thomas Savill, being his youngest Son, and to the Heirs Males of his body; and the Writ recites, That he is a Peer of the Parliament, and therefore the Writ commands, That no other Process shall be awarded against him, but what shall be awarded against a Peer of the Realm. Now Banks moved, That this Writ should be recorded, and offered a Plea comprising such matter, That after the last continuance, and before this Term, Sir John Savill, the Father of Sir Thomas Savill, was created Baron for his life, and that after his death the said Sir Thomas Savill, who was his younger Son, should be a Baron; And the Plea shews, That Sir John Savill Lord Savill dyed

dyed in September last, which was before octabis Michaelis, And that the said Sir Thomas Savill mentioned in the Patent, and the said Sir Thomas Savill mentioned in the Record, est una & eadem persona, and concludes his Plea, and prays, That no Process of Execution might be awarded against him, but what ought to be against a Peer of the Realm; And the Writ was read in Court, being the same which is in the Register, fol. 287. and Nat. Brev. 247. which is where one is sued in the Common-Bench in a personal Action and Process of Outlawry. A Writ is sent out of the Chancery, reciting, That he is a Peer of the Realm, and appoints, That no other Process shall be awarded against him, than such as shall be against a Peer; and thereupon the Court appointed the Writ to be recorded; but for the Plea, because there never was such a precedent, and that he is not Defendant in the Action, as it is in the said Case in the Register: For he is Plaintiff in the Writ of Error, and hath no day to plead. The Plea was rejected, and the Judgement being affirmed, they would advise what Execution should be.

Termis

Termينو Hillarii, anno sexto *Caroli* Regis,
in Banco Regis:

Drake *versus* Munday.

DEbt by the Plaintiff as Executor to one Drake. Upon Demurrer the Case was. By Articles indented betwixt the Testator and Defendant, It was covenanted, granted, and agreed, and the Testator covenants, grants, and agrees with the Defendant, That he shall have and enjoy such an House and Lands for six years; And that the Testator will sufficiently repair the House, *Et in consideratione præmissorum*, it is covenanted, granted, and agreed betwixt the said parties; and the Defendant covenants, grants, and agrees for him, his Heirs, Executors, and Assignes, to pay to the Testator, his Heirs, Executors, and Assignes an annual rent of ninety pounds, during the said six years, at the feast of *Annunciation* and *Saint Michael*; And upon this the Defendant entred and the Testator dyed; and for ninety pounds arear for one year after his death, the Executor brings the Action, and declares upon all this matter; and thereupon the Defendant demurs, And now Henden Serjeant for the Plaintiff argued, That this is mærlly in Covenant, and shall not inure as a Rent by way of Reservation; and if it be a Covenant, it is due to the Executor; and if it be a Reservation, it follows the Reversion, and goes to the Heir, and not to the Executor; And he moved, That so it appears to be the intent of the parties, That it should be only as a Covenant, and as a summ in gross, otherwise the words of the Covenant were idle; And he relied upon the 10. Eliz. Dyer 275. and Coke 4. Rawlings Case, and Coke 5. Justice Windhams Case. And the rather it is a Covenant; for that *ratione præmissorum* he covenants, which refers to more than the Covenant, to enjoy the Lands, &c. But all the Court conceived, That it is mærlly a Rent, and enlues the Reversion, and shall go to the Heir: For as the words of the Covenant and Grant, That he shall enjoy the Land for six years, amounts to a Lease, and shall bind the Heir; so the words of the Covenant and Grant of the Lessæ, That he shall pay such a Rent annually, amounts to a Reservation, and the rather, because he covenants and grants to pay to him and his Heirs. Vide Plowd. Browning and Beektons Case, 21. Hen. 7. 36. 1. Ed. 6. Leases, Broo. Whereupon rule was given, That Judgement should be entred for the Defendant, *Et quod querens nihil capiat per billam, unless cause were shewn*

shewn to the contrary and afterwards being moved again, it was adjudged accordingly.

Beamond *versus* Long.

2. **U**pon demurret the Case was. *Baron and Feme*, the *Feme* being Administratrix to her former husband, brings Debt upon a Bond of two hundred pounds due to the Intestate, and had Judgement to recover the Debt, their Damages, and Costs, afterwards the *Feme* dies, and a year and a day being passed, the *Baron* brings a Scire facias to have execution; whereupon it was demurred; and all the Court (besides Hide chief Justice who doubted thereof) conceived, That this Scire facias lies not for the *Baron*, because being a Debt demanded by the *Feme* as Administratrix, it is in *auter droit*; and although they recover, yet she dying before Execution, the duty remains to him who takes new administration as in right of the Intestate; and although the *Baron* is party to the Judgement, yet he hath no property in the Debt; and he who ought to have the Scire facias, must have privity and property to have the Debt, otherwise it is a vain Suit: But if *Baron* and *Feme* bring an Action of Debt for Debt due to the *Feme*, and recovers, the *Feme* dies, the *Baron* may bring a Scire facias to execute this Judgement; for the Debt being recovered, the *Baron* after the death of the *Feme* shall have it, but not in the principal Case. Residuum postea pag. 227.

Stroud *versus* Hoskins.

3. **P**rohibition. Upon the Statute of secundo Edvardi sexti, Because he sues for tythes of heath and barren ground within seven years after the improvement: The Defendant pleads the Statute of quinquagesimo Edvardi tertii, capite quarto, and that at another time a Prohibition was granted and consultation thereupon, therefore he shall not now have another Prohibition. It was shewn, That the consultation was not upon the substance of the Prohibition, but because he did not prove by two Witnesses the suggestion within the six moneths, And it was thereupon demurred. The first question was, Whether by the Statute the suggestion ought to be proved by Witnesses? And it was resolved, That it ought, because it is a meer matter in fact, and the suggestion ought to be proved by the intention of the Statute, as well as a prescription de modo decimandi, or a discharge of tythes or any other such suggestion. Secondly, It was resolved, That the consultation being granted for not proving the suggestion by two Witnesses, according to the Statute of secundo Edvardi sexti, and not upon the substance of the suggestion for want of its verity or for the insufficiency thereof, it is not within the Statute of quinquagesimo Edvardi tertii, capite quarto: For that is intended where consultation is granted upon the substance of the suggestion, being proved to be insufficient in
verdict

Verdict or non-suit after Evidence, and not where it is granted for the insufficiency of the form of the suggestion, or in the proceeding thereupon; Wherefore it was adjudged for the Plaintiff; Especially as this Case is, for that it is a collateral cause out of the suggestion, and no cause of consultation at the time of the Statute made.

Sir William Courtney *versus* Sir Richard Greenville Knight.

ERror to reverse a Judgement in the Common-Bench in debt, 4.
Where the Plaintiff declared, That the Defendant decimo octavo Maii, quarto Caroli, concessit se teneri to the said Sir Richard Greenville in 28c. l. solvend. upon request, Et profert hic in Curia scriptum prædictum quod debitum prædictum in forma prædicta testatur, cujus dat. est eisdem die & anno: The Defendant demands *Oyer* conditionis scripti obligatorii prædicti; which being read, he pleads payment; And Issue thereupon, and Judgement given for the Plaintiff; And the Error assigned, because he doth not declare according to the usual course, quod per scriptum obligatorium concessit, nor any Writing mentioned in the former part of the Declaration: So it doth not appear to the Court, That there was any Writing obligatory, and that being faulty in substance, no Plea or Verdict may make it good, But all the Court were of opinion, because he shewed the Writing, whereby he demands the Debt, and the Defendant by his Plea shews, That it is an Obligation with a Condition, and Issue is taken thereupon, and found for the Plaintiff, That the Declaration is good enough, at least it appears to the Court, That the Plaintiff hath a just Debt, and good cause to recover; wherefore the Judgement is good and was affirmed. Coke 5. Rep. 45. 7. Rep. 25. 8. Rep. 133. 8. Hen. 7. 71. 18. Ed. 4. 16.

Gray *versus* Fielder.

DEbt. Upon an Obligation assigned by the Commissioners 5.
of Bankrupts, and doth not shew the Obligation; wherefore it was demurred. And because he comes in by Act in Law, and hath no means to obtain the Obligation, it was adjudged to be good enough, without shewing it in Court; as Tenant by Statute Merchant, or Tenant in Dower, shall have advantage of a Rent charge without shewing the Deed.

Sir Miles Hobert and William Stroud Esq. their Case.

The Attorney-General exhibited two several Informations, 6.
the one against William Stroud Esq. the other against Sir Miles Hobert Knight: The charge against both of them therein was for several escapes out of the Prison of the Gatehouse, They

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both

both pleaded Not guilty, and their Cases appeared to be as followeth. The said William Stroud and Sir Miles Hobert were by the Kings command committed to Prison, for misdemeanors alledged against them in their carriage, in the House of Commons at the last Parliament: Afterwards, in Trinity Term anno sexto Caroli, both of them being by Order of this Court, and by a Warrant from the Attorney-General to be removed unto the Gatehouse: The Warden of the Marshalsey (where they were before imprisoned) sent the said Stroud to the Keeper of the Gatehouse, who received him into his house, lately built, and adjoining to the Prison of the Gatehouse, but being no part thereof. After which receipt the same night he licenced the said Stroud to go with his Keeper unto his Chamber in Greys-Inn, and there to reside. Sir Miles Hobert was also by the said Warden of the Marshalsey delivered to the Keeper of the Gatehouse; but being sick and abiding at his Chamber in Fleetstreet, he could not be removed to the Prison of the Gatehouse, but there continued with his Keeper also. Afterwards the Sickness increasing in London, they (with the licence of the Keeper of the Gatehouse, as it was proved) retired with their under Keepers to their several houses in the Country, for the space of six weeks, until Michaelmas Term then next following, when, by direction of the said Keeper they returned to his house. But in all that space it could not be proved, That they ever were in any part of the old Prison of the Gatehouse, but in the new building thereto adjoining, unless when they once withdrew themselves to a close-stool which was placed neer to the Parlour, and was part of the old Prison of the Gatehouse. This evidence was given to both the said Juries, and both of them returned their Verdicts severally, That they were not guilty according to the Informations exhibited against them: And in this case it was debated at the Barr and Bench, whether by this their receipt and continuance in the new house only, it may be said, That they ever had been imprisoned? And the Judges held, That their voluntary retirement to the close-stool made them to be Prisoners: They resolved also, That in this and all other Cases, although a Prisoner departs from Prison with his Keepers licence, yet it is an offence as well punishable in the Prisoner as in the Keeper: And Calthrop made this difference betwixt breach of Prison and escape; the first is against the Gaolers will, the other is with his consent, but in both the Prisoner is punishable: whereunto the whole Court agreed. It was also resolved, That the Prison of the Kings Bench is not any local Prison confined only to one place, and that every place where any person is restrained of his liberty, is a Prison: As if one take Sanctuary and depart thence, he shall be said to break Prison.

Termino Paschæ, anno septimo *Caroli* Regis,
in Banco Regis.



1. **M**EMORANDUM, That in this Term Sir *George Vernon*, one of the Barons of the Exchequer, was made *puisny* Justice of the Common Bench, in place of Sir *Humphrey Davenport*, who was made chief Baron of the Exchequer in *Hilary* Term last past; and *James Weston* of the Inner-Temple was, by Writ returnable *Mense Paschæ*, made a Serjeant;

He appearing in Chancery *quarto die post* of the return, being Thursday; And the Monday following, before all the Justices of the Kings Bench and Common Bench, and Barons of the Exchequer (none being absent) assembled at Serjeants Inn in *Fleet-street*, performed the solemnity, reciting his Count, And his robes were there put on; and he made his Feast in Serjeants Inn for the Justices and Serjeants and the Kings learned Council; and gave Rings, according to the usual manner, afterward with this inscription, *Servus Regi, serviens Legi*; And within two dayes, was made one of the Barons of the Exchequer.

Flours Case.

2. **A**ction upon the Case. Whereas she was a Midwife, and had used that art for divers years, and by that means gained much maintenance for her self and family, That the Defendant, having communication of her and her profession, spake these words of the Plaintiff, Many have perished for her want of skill: And after *Verdict*, being moved in arrest of Judgement, That these words were not actionable, it was adjudged for the Plaintiff, For she hath a profitable gain by that function, and therefore those words may be prejudicial.

Helier versus Hundred de Benhurst.
Pasc. 6. Car. ror. 233. Berks.

3. **A**ction upon the Statute of *Winton*. For that he was robbed of *seventy* pounds, and made Hue and Cry, and amends was not made, nor any of the Robbers taken: And Counts upon the Statute of *Winton*: And that he took his oath before John Saunders Justice of the Peace within the said County of Berks, and inha-

biting within the Hundred, within twenty dayes before his Writ brought, that he was robbed, and did not know any of the parties, according to the Statute of vicesimo septimo Elizabethæ. And upon Not guilty pleaded, a special verdict was found as for the Plaintiff according to the Declaration. And further that he took his oath before the said John Saunders, Justice of the Peace of the said County and inhabiting in the said Hundred at his Chamber in the middle Temple London. And so conclude, if upon all the matter the Court should adjudge for the Plaintiff, they find for the Plaintiff; And if, &c. for the Defendant. And the main question was, whether this examination and oath was taken secundum formam statuti. And this matter being argued at the Bar, it was alledged by the Defendants Counsel, That a Justice of Peace hath only his Jurisdiction within the County where he is a Justice of the Peace, and may not elsewhere exercise his Jurisdiction: And this examination is as Justice of the Peace of the County where the same fact was done; And the Statute of vicesimo septimo Elizabethæ appoints the oath and examination to be taken by Justices of the County, inhabiting in or nêr the Hundred; And what he doth out of the County is coram non iudice; and for that purpose were cited, 13. Ed. 4. 9. & Plowd. Comment. Plaris Case fol. 32. That a Justice of Peace cannot exercise his Jurisdiction out of his County, to commit any felon. But Littleton and Grimston for the Plaintiff moved, That this verdict finding, That he took the examination according to the form of the Statute, and so a general verdict at the first; The finding after this special matter is not to purpose, 21. Eliz. Dyer. As the Case of Sir Rowland Heyward. Assumpsit. The Jury find a general verdict according to the Issue, and a special matter against it, the last is void. But the Court took not any regard to this reason: For the matter in Law being found, the Court shall adjudge according to it. Secondly, They moved for the matter, That the examination is well taken in London: For the Statute doth not appoint, that it shall be taken in the County; but by a Justice of the Peace of the County, inhabiting in or nêr the Hundred, &c. and that within twenty dayes before the Writ brought, Because he will by intendment be more careful in the examining, he being partaker of the burthen, if it should be recovered against the Hundred; And he is to examine as well concerning the Robbery, as whether he knows any of the persons who robbed him: And they said, That of these matters, in whatsoever place he be, he may take cognisance and examination; And that they had seen a Report octavo Jacobi, That a Justice of Peace taking a recognisance out of the County, it was good enough: For which, &c. And it being moved again, all the Justices agreed, That he is said to be a Justice of Peace inhabiting in the Hundred, where his wife, family, and himself are usually commorant, although in the Term time he be at London. But Hide chief Justice, and Whitlock, conceived at first, That the examinations cannot be taken out of the County, Because it is out of

of his Jurisdiction where he is Justice of Peace, for their Jurisdiction is private: But Justices of the Kings Bench may take such examinations or exercise Jurisdiction in any place; for their authority is general; And compared it to the Case where two Justices of Peace (upon the Statute of decimo octavo Elizabethæ) set down an order for the keeping of a Bastard, it cannot be done by them out of the County; also by the Statute of quinto Elizabethæ of Labourers, Orders of Justices of Peace ought to be by them which are inhabitants in the County, and when they be in the County, and not to be made by them out of the same: And therefore because it was taken out of the County, they held it was ill. But Jones and my self conceived, That this examination and oath, although found to be taken in London, he being a Justice of Peace of the said County, and inhabiting in the Hundred, is a person whom the Statute appoints and authoriseth to take examinations; And that being taken by him, who by intendment will have strict care to the examination (because himself may be liable to part of the charge) it is not material where it be taken. And it is not any Act of exercising Jurisdiction, But rather a direction, That such oath and examination shall be taken before such a person. As if it were appointed, That such an oath shall be taken before some Knight or Judge inhabiting within the Hundred, That is not any point of Jurisdiction, but a description of the person before whom the examination shall be taken, and which may be as well taken in any other place as in the County: And therefore it was said, that there is difference where a Justice of Peace doth an Act to compell another to perform, as to imprison any for non performance; or to command one, for any offence, to be imprisoned: such Acts cannot be done in any place but where his Jurisdiction extends: But it is an usual course for Justices of Peace to take informations against offenders in any place out of the County, to prove offences in the County where they are committed: And some times they take Recognisance to prosecute; and such Recognisances taken out of the County by voluntary assent of the parties bind well enough, and are usual: But they cannot compell any out of the County to enter a Recognisance; for they cannot use coercive power out of the County; Whereupon the Court would advise. And afterwards this Case being propounded at the Table in Serjeants Inn to the chief Baron, and to Baron Denham, Baron Trevor, Baron Weston, and to Justice Harvey; and I propounding it to Justice Hutton, they all, after advice, agreed, That this examination taken in London, by a Justice of Peace of the County, inhabiting in the Hundred, though at that time he were out of the County, was good enough; And Justice Whitelock afterward agreed thereto, Because it was not an Act of Jurisdiction, but only matter of examination, to enable the Plaintiff to his Action; Whereupon afterwards, by the assent of Hyde chief Justice, Judgement was given for the Plaintiff, 47.

Ass. 11. Justices of Assise take verdicts in other Counties. 1 H. 6. 3.

Distress

Distress may be driven into another County, &c. And 27. Eliz. in Com. Bench between Charren and Barnes, a Bishop of Ireland, being in England, committed Administration of the goods of one who dyed Intestate within his Diocess in Ireland, and adjudged good.

Flower *versus* Elgar.

4. **A**udita Querela. Upon demurrer the Case was, One recovers in Debt, and takes Execution by Elegit, whereupon the Defendants Lands were extended, and after assigned over, and so conveyed from one to another into several hands; And afterwards the Plaintiff in the Action released all such Judgement and Executions; And now the Defendant brings an Audita Querela and all this matter was shewn in the Writ, and thereupon it was demurred, Because the Writ is brought against the first Plaintiff, who did recover where he had dismissed himself of all the interest of the Extent, and it ought to have been brought against the Assignee of the Extent. But notwithstanding, the Court adjudged, That the Audita Querela was well brought; For he being party to the Judgement, his release hath discharged the Judgement.

Fawkenor *versus* Bellingham.

5. **E**rror to reverse a Judgement in the Common Bench (quod vide ante pag. 80.) was argued divers times at the Barr; And now this term at the Bench, the Error assigned in point of Law. All the Justices, viz. Hide, Jones, Whitlock, and my self, argued in one day, and delibered our opinions in order, That this Judgement is erroneous, and ought to be reversed; For we all conceived, It was the same rent as before, and not a new rent begun by the Statute, but changed by operation of Law from a Rent Service to a Rent Seck; Nor is it a new Rent given by the Statute, because it doth not appoint any certainty of Rent, but refers, That such a Rent as the Lords thereof had before they yet shall have, such in quantity, such in estate. And Jones said, That if he had recovered this rent before the Statute in an assise, and after the Statute had been disseised again, he should have had a redisseisin, which shews that it is the same Rent. And Jones and Hide conceived, If Rent be given by Statute, and no limitation of a distress therein, it is a Rent Seck, and there cannot be a distress for that Rent. But here it is agreed on every part, That to this Rent there belongs a distress, and the reason is, Because a distress belonged to this Rent before; so being changed the distress belongs to it; And it is expressly within the letter and intent of the Statute, That no Advowry shall be made for Rent unless there hath been seisin thereof within forty years: And it doth not appear but that this Rent might be

he lost for want of seisin, before the Statute of primo Edwardi sexti; and as the Statute of tricesimo secundo Henrici octavi bars to claim it, unless he hath had seisin within forty years; so the Statute of primo Edwardi sexti doth not alter it, nor give more liberty thereto than it had before; And therefore if it shall be said to be Rent created by the Statute, it ought to appear by the Statute what the Rent is in special which is created by the Statute, but that doth not appear, and therefore it is the same Rent which was before, of which the beginning is not known, whereof seisin ought to have been within forty years; and thereupon Jones put this case. If Lord and Tenant by Rents and Services; If the Tenant by licence at this day makes a Feoffment by Indenture, to hold of him by the same Services as he holds over, In Abowry for this Rent, there ought to be seisin within forty years: For it is not a Rent of certainty newly created, but refers to the ancient Tenure, which ought to be shewn and seisin proved; but if he create a Rent certain it is otherwise. And there is difference, as all the Justices held, where the saving is of all Rents; for that nihil certi implicat, and where it is a saving of a particular Rent to certain persons; and it would be a great mischief if there should be such an exposition, That Rents generally saved by the Statutes, should be out of the Statute of Limitation; wherefore they all concluded upon the point in Law, That this Plea, That he was not seised within forty years, &c. was good, and the Judgement given for the Defendant erroneous. But Whitlock and Hide conceived, That the Abowry is ill, because it was said, That ultimus Presbyter was seised of the Land holden jure Presbyteratus, whereas none can be seised in jure del Priesthood, which is his Office, but in jure Cantuariæ only. And to that point the other Justices spake not; but upon the point in Law, they all agreed, That the Judgement should be reversed.

Termino



Termino Trinitatis, anno septimo *Caroli* Regis,
in Banco Regis.

Ward *versus* Unicorn.

- I. **D**Ebt for seventy two pounds, *Whereas* the Plaintiff and Defendant 29. Decemb. 6. *Caroli*, submitted to an Award of all Actions, Suits and Demands betwixt them, to be Arbitrated by I. S. and I. D. So that they made their award by Indenture before the fifth of January next following. And shews, That they, upon the fifth of January, by Indenture, made their Award upon the Premises, and thereby Awarded seventy two pounds to be payed by the Defendant to the Plaintiff, and that either of them before the twelfth of January following should make a Release, from one to another, of all Actions, Suits and Demands, before the twenty eighth day of December last past. That for not paying this seventy two pounds the Plaintiff brings this Action. The Defendant pleads nil Debet, and found for the Plaintiff, And Germin moved in arrest of Judgement, That this Arbitriment is void, because they did not determine all Controversies to the time of the Submission: For they appoint a Release to be made of all Actions and Demands untill the twenty eighth of December: So the twenty eighth of December is one day before, and there might divers causes of Action arise the twenty eighth of December, And the Arbitriment made the fifth of January recites, That Actions and Controversies were then depending, wherefore this Arbitriment was void, and the Plaintiff ought not to have Judgement. But Whitfield è contra. For they recite in their Award that they made their Arbitriment de & super pramissis. So it shall not be intended That any new cause of Action arose upon the said twenty eighth of December, unless it be specially shewn, And when they say they made an Award de & super Pramissis, it shall be intended that they made an end of all things submitted unto them, (and which were notified unto them) unless the contrary be specially shewn, And this Release shall discharge all matters, although they were depending in suit the twenty ninth of December, being the day of Submission, they arising for causes before: And for that he relied upon *Bispoles Case*. *Cok*. 8. fol. 97. and cited a *Case Trin*. 43. *Eliz*. rot. 947. betwixt *Barnes* and *Greenway*, where a submission made the fourth of December, of all matters and controversies betwixt them, and the Award was of sixty pounds to be paid in satisfaction of all causes and matters untill the third of December,

tember, and so excludes one day before the submission, and for this cause exception taken and yet adjudged good; For it shall be intended a final determination of all causes, And there shall not be supposed that any cause did newly arise the third day of December, unless it be specially shewn; so here, &c. for which, &c. And of this opinion was all the Court; for when he saith they made an Award de & super præmissis; and it doth not appear to the Court by any special shewing, That there is any cause newly arisen upon the said twenty eighth of December, the Court will not conceive any; therefore the Award is well made, especially when he takes Issue, That nullum tale fecerunt arbitrium, or Nil debet, which is all one as this case is; Whereupon a Rule was given, That Judgement should be entred for the Plaintiff, unless cause shewn, &c.

Flower *versus* Baldwin. Hill. 4. Car. rot. 687.

TRespals. Upon a special Verdict the Case was. One bargains and sells by Indenture octavo Julii vicesimo Jacobi; The Dæd is acknowledged the tenth of July before a Master in Chancery; The ninth of October following the Bargainor suffers a Judgement in the Common-Bench; The eighteenth of October the Indenture is inrolled in Chancery: Issue was joyned, Whether the Bargainor was seised in fee at the time of this Judgement? And all this matter being found by special Verdict, Littleton for the Plaintiff argued, That the Indenture being inrolled, shall have relation to the time of the sealing and delivery thereof, and makes the Bargainor seised ab initio, and then the Bargainor was not seised at the time of the Judgement; and for that he relied upon 8. Ed. 6. Bro. *Inrollment de fays* 9. where two Joyntenants the one bargains, &c. the other dies before Inrollment, and the Inrollment is within the six moneths, the moiety only shall pass; for the Dæd intended to pass but the moiety: And Coke Litt. 147. if after the bargain and sale: the Bargainor and Bargainor joyn in a Grant of a Rent-charge, the Dæd is inrolled within six months, it is the Grant of the Bargainor, and confirmation of the Bargainor. And if bargain and sale be of a Manor, and an Advowson appendant, and the Church becomes void before the Inrollment, the Inrollment being within the six Moneths, the Bargainor shall have the benefit of this presentation, and of all arrears of Rents incurred before the Inrollment, it being within the six moneths. So if a Bargainor hath a Wife and dies, afterward the Dæd is inrolled, The Wife shall have Dower, as it was resolved for the Wife of Baron Frevill; And that, Trin. 14. Jacobi betwixt Gawen and Stacy, it was adjudged, That if the Bargainor grants a Rent out of the Land before Inrollment, and afterwards it is Inrolled, the Grant is good; wherefore, &c. But Charles Jones argued for the Defendant, That untill Inrollment the possession and freehold continues in the Bargainor, and nothing

be bests out of him; for the Statute is expresse, That nothing shall passe untill Inrollment; so that untill the Inrollment he remained seised; Then the Inrollment not being untill the eighth of October, and the Judgement being the ninth of October, and the Issue being, Whether he were seised in for the ninth of October: Upon this special verdict the Issue is found for the Defendant; which is the reason, in Coke 4. Hinds Case, That if a Bargainor makes a Feoffment or levyeth a Fine before the Inrollment to the Bargainee himself, and afterwards the Dēd is inrolled, the Bargainee is in by the fine or Feoffment; but the Inrollment shall take away all incumbrances made by the Bargainor himself to a Stranger, that they shall not prejudice the Bargainee; for the Inrollment hath relation to take away all incumbrances: For which, &c. And all the Court agreed, That the Inrollment of the Dēd within the six months relates to the sealing of the Dēd, and makes the Bargainee in, to avoid all incumbrances made unto Strangers after the inrolling. But Jones Justice conceived, That in rei veritate the Bargainor shall be said to be seised allwayes untill the Inrollment, and nothing passeth to the Bargainee untill the Inrollment; for it is so expressly appointed by the Statute; and it is quasi conditio precedens, and untill it be performed nothing bests in the Bargainee. And he cited a Case betwixt Bellingham Bargainor, and Alsop Bargainee secundo Jacobi, That if a Bargainee before Inrollment bargains the Land to any other, and after the first Dēd is inrolled, and afterwards the second bargain and sale, and both of them within the six months: The second bargain and sale is void, because there was nothing in him at the time of the bargain and sale; and therefore he and Hide chief Justice inclined (as this Case was, and the Issue joyned and found) for the Defendant. But I was of opinion, That when the Inrollment is within the six months, he is in ab initio, and the fee bests in the Bargainee ab initio; for the Statute of vicesimo septimo Henrici octavi executeth the possession to the use; but that is stopped untill the Dēd be inrolled within the six months, and when the Dēd is inrolled, it bests in him ab initio, and the possession is expectant to the use at the time of the sealing of the Dēd; and untill the Dēd inrolled, the Bargainee hath election, whether he will take it by the Dēd, or not: which is the reason, That if he himself in the interim takes an Estate by Feoffment or Fine, he himself destroyes the use, and takes by conveyance at the Common Law, and not by the use: But when he himself doth no act of disturbance, and the Inrollment is within the six months, it shall relate to the date of the Dēd; and that is the reason he shall have all Rents incurred in the mean time, and the benefit of presenting to Churches when they fall, and shall be said seised ab initio; And then the Bargainee is seised the said ninth day of October, being the day of the Judgement, and not the Bargainor, &c. Whereupon the Court would further advise.

Atkey versus Heard.

Action *sur Trover & Conversion* of Goods of the Intestates. 3.
The time of the conversion being supposed after the Administration committed, Verdict being found against the Plaintiff, the question was, Whether the Plaintiff should pay costs: and resolved, That this Action being grounded upon the Conversion in his own time, and not in the time of the Intestate, was as his own proper Action; Wherefore he should pay costs.

Taylor versus Willes. Trin. 5. Car. rot. 1204.

Error *sur* Judgement in Excester. In an Action of the Case upon an Assumpsit, That in consideration the Plaintiff Willes would deliver two hundred and a quarter of Tread, the Defendant Taylor assumes to pay as much as it should be reasonably worth; and upon another consideration assumed to do another Act; Taylor pleaded Non assumpsit; the Jury find quod Assumpsit, and assess for damages thirty three pounds six shillings eight pence (to be paid in Dying, if by Law it may be) and assess for costs six shillings eight pence; And Judgement was given, That he should recover the thirty three pounds six shillings eight pence for damages assess by the Jury, and the costs; and Error being brought, Germin for the Plaintiff in the Writ of Error assigned for Error, First That the Verdict is ill, Because they find generally quod assumpsit, and do not divide them being several, sed non allocatur; for if they were upon several promises, yet Non assumpsit generally is good; And the Verdict so general is good. The second Error was, Because it was found, That the damages of thirty three pounds six shillings eight pence to be paid in Dying, if by Law it may be, is void, &c. sed non allocatur; for the finding the Assumpsit is good enough, and so was the assessing damages to thirty three pounds six shillings eight pence, but that which is found after is void, and the Judgement (omitting that which was void) is good enough; Wherefore the Judgement was affirmed. 4.

Mariot versus Kinsman. Mich. 5. Car. rot. 38.

Debt. Upon an Obligation, The Defendant demands Oyer of the Condition, which was, Whereas he had taken A. S. a widow to wife, being possessed of divers Goods, If he should permit his said wife to make a will and to dispose in Legacies as much as she would, not exceeding fifty pounds, And pay and perform what she appointed, so that it did not exceed fifty pounds, That then, &c. The Defendant pleads, That she did not make any Will. The Plaintiff takes issue thereupon, and 'twas found, That she made 5.

made a Will, and thereby disposed of divers Legacies, not exceeding the sum of fifty pounds; But that she was *Covert* at the time of the Will making, &c. And it was adjudged for the Plaintiff: For although she being a *Feme Covert*, could not in Law be permitted to make a will to dispose of any Goods without the Husbands assent, yet it is a will within the intent of the Condition; For it was the intent of the Condition, that he should make a will to that purpose, notwithstanding the *Coverture*; And it is but her appointment, which the husband by his obligation is bound to perform: For which the finding that she was a *Feme Covert* is not material: Whereupon a Rule was given, That Judgement should be for the Plaintiff, unless other matter was shewn, &c.

Drakes Case.

6. **P**rohibition. To stay a suit in the Spiritual Court before the Commissioners Ecclesiastical for Alimony: Where the libell supposeth divers particular cruelties used upon the wife, for which she was enforced to depart; And that the husband would not allow her any maintenance, and therefore she sued before the Ecclesiastical Commissioners for maintenance. And because it is a Suit properly suable before the Ordinary, wherein if there be any wrong, the party grieved may have an Appeal; And although this is one of the Articles, whereby authority is given them by the Commission to hear and determine; yet because it is not any of the causes which are within the Statute of primo Elizabethæ, for which causes the Commission is ordained, the Court awarded a Prohibition ex motu one *Laurentii Hide Militis*.

Rockey versus Huggens. Trin. 4. Car. rot. 764.

7. **E**jectione firmæ. Upon a special Verdict the Case was, A Copyholder for life pretending a custome in a Manor, That he may cut down and sell Elms growing upon his Copyhold; And the Lord pretending, That there was no such custome; or if there were, That it was void and against Law, enters for a forfeiture, and makes the Lease to the Plaintiff: The Copyholder re-enters: and upon Not guilty pleaded, the Jury found, That the Land was Copyhold for life, And that he cut down Elms, being timber trees, and sold them, And found the custome of the Manor as the Copyholder pretends; And whether it were a good Custome or not, was the question? And it was oftentimes argued at the Barr by Germin and Brampton Serjeants for the Plaintiff, and by Rolls and Charles Jones for the Defendant. And now this Term all the Court resolved for the Plaintiff; For this custome found, is a void and unreasonable Custome, and not allowable by Law, That a Copyholder for life may cut down and sell timber trees, and dispose of them at his pleasure, For it is in destruction of the Inheritance and

and against the nature of a Cōpyholder for life. But peradventure there may be such custome for a Cōpyholder of Inheritance, that being only to the prejudice of him and his heirs; And when he hath quash an Inheritance in the Cōpyhold, he hath so likewise in the trēs growing thereupon. But a Cōpyholder for life hath but a particular estate in the Land, and so he hath in the trēs; And it is unreasonable. That he should cut down, sell and destroy the Inheritance, and it would be to the great prejudice of those who succeeded, for they should not have to maintain the house and the plough. And although it was urged at the Barr, That it being found to be the custome, the Court shall not adjudge it ill and unreasonable, when it may have reasonable beginning: For as Lessee for life may be without impeachment of Waste, so it may be here, That the Lord granted it at the beginning with this liberty, and the Lord by that means might have the greater fine upon the granting of the Cōpyhold; And this Cōpyhold being by intendment alwayes in the hands of particular Tenants, it may be supposed that they planted and nourisht them, and therefore should have the greater liberty to cut down and dispose of them. But the Court held, That these reasons will not maintain this custome; For Lease for life or years, without impeachment of Waste ought to be begun by Dēd and without Dēd is not good. And it is against the nature of the Estate of a Cōpyholder, that he should do Acts in destruction of his Estate; therefore customes which maintain them shall be allowable, but not e converso. And a president was shewn to the Court, Hill. 45. Eliz. rot. 156. in the Com. Bench betwixt Powell and Peacock, where such a custome was pleaded in Trespass and adjudged, It was not good. And I my self have seen the report of a Case, Hill. 6. Jac. rot. 2613. betwixt Rowles and Masters, upon a special Verdict in an Ejectione firmæ, which was adjudged Trin. 10. Jac. where the custome of Beauminstre was that a Cōpyholder for life might nominate his Successor, and so in perpetuum, &c. That such a Cōpyholder might cut down and sell timber trēs; All the Justices argued, That where such a Cōpyholder hath the Inheritance, and where his successor comes in by his nomination (whom by intendment he would not prejudice) there such a custome might be good. But they all agreed, such a custome for a Cōpyholder for life to cut down and sell Trēs, was not good; And they there cited the Case of Powell and Peacock to be so adjudged, and to be good Law. And so all the Court here held, That this custome found is void and unreasonable; Whereupon it was adjudged for the Plaintiff. Vide 14 Ed 3. Barr. 77. 21. Hen. 7. 40. 11. Hen. 7. 14. 9. Hen. 4. Wast. 59.

Congham *versus* King. Hill. 6. Car. rot. 114.

Covenant. Against the Defendant as Assignee of an Assignee, 8.
for not repairing of an house let inter alia. The Defendant
takes

takes Issue upon the mean assignment of the Lease laid in the Declaration. After verdict for the Plaintiff, Wright took divers exceptions to the Declaration in arrest of Judgement, That the Plaintiff shews the Lease to be to J. S. and by him devised to J. D. and made J. N. his Executor, and that he virtute legationis entred and assigned to W. S. and he entred and assigned one house, parcell of the premises, to the Defendant, who entred and made spoil in an Hall and Chamber, parcell of the demised premises, &c. One Exception was, Because he shews that the Devisee entred and was possessed virtute Legationis, and doth not say, That the Executor assented, sed non allocatur : For being alledged, That he thereof was possessed virtute Legationis, and Issue being taken upon a collateral matter, it shall be intended that he entred with the assent of the Executor. Another exception was, Because the breach was assigned in such an house parcell præmissorum, and doth not say præmissorum prædimissorum, and to him assigned ; for in the Lease are divers things excepted, and it may be that this is parcell of the things excepted, or not parcell of the premises assigned, sed non allocatur : For præmissa shall be intended prædimissa & assignata, and shall not be extended to any Lands not dimissa. The next exception alledged was, That the Defendant is but Assignee of parcell of the things demised ; And then he is not chargeable with this Covenant, no more than the Assignee of parcell shall be charged in debt for the Rent ; But the Action lies against the first Lessee, as it is held Cok. lib. 3. Walkers Case ; sed non allocatur : For this Covenant is dividable and follows the Land, with which the Defendant, as Assignee, is chargeable by the Common Law, or by the Statute of tricesimo secundo Henrici octavi, Whereupon it was adjudged for the Plaintiff.

9.

A *Feme Covert* sues in the spiritual Court (without her husband, as she may) for defamation, and sentence for her, and costs assessed. In Appeal of this Sentence to the Archies, The Defendant pleads there the release of the *Baron* as well for the Sentence as for the Costs, which was there disallowed ; whereupon he prayed a Prohibition : For it was alledged, That as a *Feme* may sue, so the *Baron* may release, and that being released is to be guided according to the Common Law. But the Court conceived, That the release of the *Baron* cannot be a barr to this suit quoad reformationem morum : For the *Feme* being scandalized, may sue in the spiritual Court to be repaired therein ; and the Court may sentence the Defendant to a submission or corporal satisfaction, which the *Baron* cannot release. But for the release of the costs, The *Baron* may well do it ; Whereupon Rule was given, If cause were not shewn at a day, &c. That a Prohibition should be awarded to stay the suit quoad the Costs.

Sir William Masham *versus* Bridges.

10.

Action of the Case for words. Whereas he was a Justice of Peace of the County of Essex by vertue of the Kings Commission for the space of ten years, That the Defendant the first of January, sexto Caroli, spake of him, being then Justice of Peace of the same County, Sir William Masham is but an half eared Justice, he will hear but on one side. After Verdict upon Not guilty pleaded, and found for the Plaintiff, it was moved by Jones in arrest of Judgement, That he hath alledged he was Justice of Peace by vertue of the Kings Commission for ten years last past, which cannot be; for the King hath not reigned so many years; so it is impossible and contrary in it self: and without shewing, That the words were spoken of him as of a Justice of Peace, the Action lies not. And of this opinion was all the Court, That if it be not sufficiently shewn he was a Justice of Peace at the time of speaking the words, and so no scandal to him as Justice of Peace, the Action lies not. But the whole Court conceived, Although the first words, shewing he is a Justice of Peace by the Kings Commission, &c. were void and apparently vitious (for it is impossible;) And if he had rested there, and there had been no other shewing of his authority, the Action would not have lyen: yet when he shews that he spake of him, such words Advunc Justice of the Peace (which is at the time of the speaking of the words) that sufficeth; And what was alledged before is but surplusage and vitious. And for the words they held, That they were scandalous (being spoken of a Justice of Peace;) Whereupon it was adjudged for the Plaintiff.

Sankill *versus* Stocker.

11.

Action for words. After Verdict for the Plaintiff, it was moved in Arrest of Judgement, That here is a Mis-triall, not aided by any Statute; For upon the Venire facias there were but twenty three Jurors returned, where there ought to have been twenty four; And the Tryal was made by ten of the principal Panell, and two of the Tales de circumstantibus. But Jones, Whitlock, and Hide chief-Justice conceived, That, the Tryal being made, the non returner of the twenty fourth is but a misreturn of the Sheriff, which is aided by the Statute of decimo octavo Elizabethæ. And for this was the Case in Cok. lib. 5. fol. 37. betwixt Tyrrill and Gardiner cited, whereupon the Venire twenty three were returned, and the Tryal was by twelve of them; That was good, and ayded by the Statute. But against that it was urged by Maynard (and I my self

self was of that opinion) That where the tryal is by twelve of the principal, It is good. But if there were not twelve of the principal sworn, It shall not be good. And for this purpose was cited the case in anno vicesimo Jacobi, betwixt Calthorp and News; where in like manner, a Tryal was by ten of the principal and two of the Tales, and it was adjudged a mis-tryal; whereupon it was adjourned. But afterwards upon conference with the Justices of both Serjeants Inns, the greater part of them conceived, It was but a mis-return, and aided by the Statutes of decimo octavo Elizabethæ, & vicesimo primo Jacobi: And although the Tryal was by two of the Tales, it is not material to the parties, nor prejudicial to any of them, but only to the Jurores, who lose their Issues; And it being but a Misreturn by the Sheriff, was aided by the Statutes; Whereupon it was adjudged for the Plaintiff.

Termino



Termino Michaelis, anno septimo *Caroli* Regis,
in Banco Regis.

IN this Vacation, viz. 25. August Anno 1631. Sir *Nicholas Hide*, chief Justice of the Kings Bench, being a grave, religious, discreet man, and of great learning and piety, dyed at his house in the County of *South-hampton*; And Sir *Thomas Richardson* chief Justice of the Common Bench, was made chief Justice of the Kings Bench, and sworn the 24. of *October*. He came to the said Bench attended with divers of the Serjeants: And being in the Court (after a speech by the Lord Keeper, signifying the Kings pleasure, and his answering shortly thereto) he was sworn, and his Patent read; which was a Writ under the great Seal, directed unto him by the name of *Thomas Richardson, chief Justice of the common Bench*, That the King had appointed him to be chief Justice of the Pleas, before himself to be held, and commanded him to attend the said Office; which being read, he took his place in the Court: And the same day Sir *Robert Heath* was sworn Serjeant in Chancery. And upon the 25. of *October*, being Tuesday, came in his party-coloured Robes to the Common Bench and performed his ceremonies as Serjeant; and the same day kept his Feast at *Serjeants Inn* in *Chancery-Lane*, and gave Rings to every of the Judges, *quorum Inscriptio fuit, Lex Regis, vis Legis*. And afterwards upon the 27. of *October*, being Thursday, he was sworn chief Justice of the Common Bench. And the next day after *William Noy*, one of the Readers of *Lincolns Inn*, was made the Kings Attorney General.

Smith *versus* Norfolk.

DEbt. As Administratrix to Smith her husband, for two and twenty pound due upon a Lease for years, made by the Intestate, for a Quarters rent due in the time of the Intestate, and two Quarters rent after his death; The Lease being made for one and twenty years by the Intestate, out of a Lease for years, whereof he was possessed, both of them having continuance for divers years yet to come. And the Action was brought in the Detinet only: And after verdict for the Plaintiff, Noy and Germin moved in arrest of Judgement, That the Declaration was not good, Because for the two last Quarters of Rent, due after the death of the Intestate, the Action ought to have bin in the Debt & Detinet: And for that, they relied upon *Hargraves Case*, *Coke* 5. fol. 31. But Jones, Whidlock, and my self held, That the Action was well brought in the Detinet: He having the interest only as Administratrix; And that *Hargraves Case* reported, is not

ff

Law:

Law : And Jones said, he knew it to be reversed in point of judgement for this cause ; Whereupon Rule was given, That Judgement should be entred for the Plaintiff, unless other cause was shewn, &c.

Tavernor versus Skingle.

3. **D**Ebt. Upon an Obligation of one hundred pounds conditioned to perform the Award of J. S. and J. D. so as they made their Award before the tenth of October following, under their hands and seals, and if they did not agree, then to stand to the umpirage of J. N. so as he made it in writing under his hand and seal before the twentieth of October following. The Defendant pleaded, That the said J. S. and J. D. did not make any Award before the tenth of October, nor J. N. the Umpire, before the twentieth of October, &c. The Plaintiff replies, True it is, That J. S. and J. D. did not agree, nor make any arbitrament before the tenth of October ; but that J. N. the Umpire did make an Award before the twentieth of October, under his hand and seal, and shews it ; wherefore inter alia, the Defendant was to pay to the Plaintiff thirty pounds upon such a day, at the house of William Sutton in Chelmsford, being the sign of the Cock, and for the non payment of the said thirty pounds, alledgeth the breach ; And thereupon the Defendant demurs : And Wright for the Defendant moved, That this submission is void and uncertain ; for it is, If they do not agree, and it doth not appear to what they should agree, and an uncertain submission is void, sed non allocatur : For the words, If they do not agree, have the intendment, if they do not agree and make their arbitrament under their hands and seals before such a day ; for otherwise it is quasi no agreement within that condition. Secondly he moved, That this arbitrament by the Umpire was void ; for he appoints money to be paid at the house of a Stranger, wherein by intendment the Defendant hath no interest, nor can compell him that is owner of the house to suffer money to be paid there ; And an arbitrament ought not to appoint a thing to be done to a Stranger, or by a Stranger, over whom the Defendant hath not power, nor in a Strangers house, by which Act the Defendant might be a Trespasser. See Coke lib. 5. fol. 77. 22.Hen.6.46. But all the Court agreed, That the arbitrament was good ; For the appointment of the payment of the money at a Strangers house (especially being by intendment a common Inn) cannot be unreasonable, or shall make an unlawfull Act ; but by intendment the Plaintiff will procure such kindness, That the money may be paid there ; and if the Stranger shall deny the payment to be there, it peradventure may be a good excuse for the Defendant : But the arbitrament by it self, prima facie, is good enough ; Whereupon it was adjudged for the Plaintiff.

Beaumont *versus* Long, quod vide ante fol. 208.

WAs now moved and argued by Maynard for the Defendant and by Rolles for the Plaintiff; And for the Plaintiff he first argued, That although the Husband shall not have a debt due to the Wife, after her death without recovery, yet if they bring debt and recover, and after the Wife die, the Husband shall have that debt, quia transic in rem judicatam; and although the Baron here should have execution in the right of his wife as Administratrix, he could not have it to his own use, but to satisfy the Debts of the Intestate: And when they are satisfied, he is chargeable over in Account to the next Administrator, or peradventure shall be chargeable for that Debt as an *Executor de son tort demesne*, And they having been at the charge to recover that Debt, and Costs, and Damages, awarded unto them; It is no reason the husband should lose them: And he cited one Prests case in nono Jacobi, in the Common-Bench, where an Administrator, during minor, estate, recovered in Debt, That the Executor at his full age might have Execution of that Debt: But all the Court (Chief Justice being dead, and none in his place) conceived, That this Scire facias, lies not; For the first Action was brought by the Baron and Feme Administratrix, which is in anothers right; And the recovery being thereupon, is in right of the Intestate; And the Feme being dead, the Baron cannot claim that Debt; For he not being Administrator hath not any interest therein: For the Administratrix being dead, the Suit is merely determined, and cannot be revived by any, but by him who comes in, in that right, and so doth not the husband; And it differs not from the Case of vicelimo octavo Henrici octavi, cited in Cok. lib. 5. Brudnells Case, where an Executor recovers Debt and dies Intestate; The Administrator cannot have a Scire facias, because he is not privy to that Judgement, and he claims not *per amont* the Judgement, And they doubted of the Case cited nono Jacobi: But it is clear if Administration be committed, because no will is extant, and the Administrator recovers in Debt, and after the Will is proved wherein there is an Executor, such an Executor shall never have a Scire facias upon that Judgement, And although it was objected, That the Judgement is for Costs and Damages, which belong to the Baron, although the said Debt did not belong unto him; And therefore the Scire facias should be maintained for the Damages: Yet the Court held, That the Scire facias, To have execution of the Judgement, for the Debt, and also for the Damages, is not maintainable, And whether he might maintain a Scire facias for the Damages and Costs, They would not deliver any opinion. Yet it appears decimo nono Edwardi quarti, If one recovers in a reall Action Land, and Damages, and dies before Execution, The heir shall have a Scire facias to have Execution for the Land, and the Executor for the Damages. But

for the principal case, they all held, That the Scire facias lies not as it is brought, And gave Judgement for the Defendant. And this Case being moved at the Table at Serjeants Inn to the chief Baron and other Barons, and to Justice Harvie, They all agreed in the same opinion. Vide postea 458.

Reynell *versus* Champernoon.

5. **T**Respass. For taking and cutting of his Nets and Dares. The Defendant justifies; For that he was seised in Fee of a feveral Piscarie: And that the Defendant, with divers others, indeaboured with their Dares to row upon his water, and with the Nets to catch his Fish: And for the safeguard of his fishing, he took and cut the Nets and Dares, &c. Thereupon the Plaintiff demurrs. It was moved by Bultred Whitlock, That this Plea is not good: For he cannot by such colour cut the Nets and Dares. And of this opinion was all the Court, for the reason supra: But he might have taken the Nets and Dares and detained them as *damage fesante*, to stop their further fishing. Whereupon it was adjudged for the Plaintiff.

Tyler *versus* Wall.

6. **T**Respass of Assault, Battery and Imprisonment. Ultimo die Octobris, sexto Caroli, apud Withering, and carrying him to Tyverton, and detaining him in prison for two dayes. The Defendant justifies, Because decimo tertio Augusti, sexto Caroli, A Writ of Supplicavit, de bono gestu, issued out of Chancery; And by a warrant from the Sheriff to the Defendant, being his Bayliff, he arrested the Plaintiff the twenty first of September, and detained him two dayes, and carryed him to Tyverton, and delibered him to the Sheriff, which is the same Arrest, Detention, and Imprisonment, &c. The Plaintiff replies and confesseth the Writ, Warrant and Arrest, the twenty first of September, and Imprisonment for two dayes, as the Defendant hath alledged. But shews, That he afterward found sureties before the Sheriff according to the Writ, and was discharged. And that the Defendant Postea, videlicet, prædicto primo Octobris, sexto Caroli, Assaulted and Imprisoned him, *de son tort demesn*. Et hoc, &c. And upon this, The Defendant demurrs. And now Hutchings for the Plaintiff, moved, That the Plea in Barr was not good, Because he doth not answer the time in the Declaration, videlicet, ultimo Octobris, neither by Answer nor by Traversers. But Grimston for the Defendant, argued, That the justification being of an Act in the same County, and justifying all the time in the Declaration, although it doth not agree with it in the day, but concludes Quæ est eadem Transgressio, &c. is good enough, The day not being materiall. And all the Court was of the same opinion, and also conceived, That the Re-
plication

plication was not good, varying from the day in his Declaration, and is a departure therefrom ; Wherefore, &c.

Hughs, Administrator of J. D. *versus* Harrys.

Accompt. Against the Defendant : For that he occupied, as 7.
 Gardian of J. D. for nine years, such Lands which were
 granted to W. D. father of J. D. and his heirs, by Cope of Court
 roll, tenendum secundum consuetudinem Manerii of O. who entred
 and dyed seised thereof, which descended to the said J. D. and the
 Defendant receivd the profits as Gardian ; and afterwards J. D.
 dyed, and the Plaintiff, as Administrator unto him, brings the
 Action. The Defendant pleads, That he did not receive the pro-
 fits as Gardian ; and issue thereupon, and found for the Plaintiff.
 And now Grimston moved in arrest of Judgement, first, That the
 Declaration is not good, Because he doth not recite the Statute of
 Marlbridge, according to the usual course in such Declarations ;
 sed non allocatur : For being a general Law, it needs not to be re-
 cited ; Also that Statute doth not give the Action, but is only in
 affirmance of the Common Law, as Coke Litt. 89. is. Secondly,
 It doth not appear that they were Franchold Lands, but may be
 Copehold : Then against such a person which occupies a Cope-
 hold, accompt lies not ; sed non allocatur : For although it be men-
 tioned, That the Land is granted by Cope, it is not said, Tenen-
 dum ad voluntatem Domini, so it may be well intended a Franchold :
 And in Wales there be many Francholds granted by Cope and by
 Veirg. And for the Plea, which was, That he did not receive as
 Gardian. And being found against him, it shall be intended lawfull
 Gardian ; Whereupon it was adjudged for the Plaintiff.

Action for these words, of an Attorney : Thou art a Knave, and 8.
 stirrest up Suits betwixt parties ; and stirredst up a Suit betwixt
 such parties to their undoing ; and it is great pitty such persons should
 go unchanged. Adjudged for the Plaintiff, That the Action lies.

Hollingsheads Case.

Hollingshead prays a Prohibition to stay a suit in the spiri- 9.
 tual Court for Defamation, for speaking these words : Thou
 art a Bawd, and I will prove thee a Bawd. And because these are
 words properly determinable in the spiritual Court, and for which
 no Action lies at the Common Law, a Prohibition was denyed.
 But for saying, Thou keepest an house of Bawdry, This being mat-
 ter determinable at the Common Law by Endiament, suit shall
 not be in the spiritual Court. Vide 27.H.8. & Coke lib.4 fol.20.

Sanders *versus* Cornish. Trin. 5. Car. rot. 840.

10. **T** Respass. Of his Closs breaking at Westbrook. Upon Not Guilty pleaded a special verdict was found, That Simon Sanders was possessed of a Lease for one hundred and threescore years of the Land in question; And by his Will in writing, reciting that he had such a Lease, deviseth, That his Brother Christopher Sanders should have the use and occupation thereof, and should take the profits of it during his life; And after his death, The use and occupation should remain to the Wife of Christopher during her Widowhood; And after her Widowhood, The use, occupation, and profits of the Premises, to be and remain unto the eldest son of the said Christopher, which he shall happen to have during his life; And after, such son dying without heir Male, to any other son which the said Christopher shall happen to have, one after another in form aforesaid. And if the said Christopher happen to dye without heir male of his body, And for that I have a purpose to have the same Lease kept in my name, My Will and meaning is, That the use and profits and occupation shall remain and be unto *Simon Sanders, &c.* in the same manner as before, &c. And so to divers others in the same words: And makes the said Christopher and Simon Sanders his Executors, and dies possessed: And that the said Executors proved the Will and assented to the said Legacy: That Christopher entred, and dyed without Issue, and made the said Simon his Executor; which Simon entred, and had Issue John, and the Plaintiff his eldest son, and after made John his son Executor, and dyed; and John proved the Will and entred, and made the Defendant his Executor and dyed: And that the Plaintiff entred, and the Defendant ousted him: And if, &c. The question was, Whether this devise of a term in this manner be good to go in remainder? And if such Remainders, the one after the other, and limitation of the Devise of a Lease, may be good? And all the Court inclined, in opinion, That the Devise of a term in this manner to make a perpetuity, cannot be good: For to limit a possibility after a possibility, and to limit the remainder of a term after a dying without issue, stands not with Law. But the Court would advise.

Jenkins *versus* Young. Pasch. 6. Car. rot. 53.

11. **E**rror of a Judgement, in the County of Fliors. The Error was assigned in the matter in Law. The Case being adjudged, upon a special Verdict in an Ejectione firmæ, was, That tricesimo tertio Elizabethæ, one Meredith gave that Land to Edward Randall and his wife, Habendum to the said *Baron and Feme*, to the use of them and the heirs of their two bodies; And for default of such issue, To the use of Edward Morgan and his heirs. And whether the *Baron and Feme*

Feme have an estate Tayle, or but for their lives, was the question? And it was there adjudged for the then Plaintiff, That it was an estate Tayl: And now argued by Lisleton, That it was Error; For he alledged, That the Estate, out of which the use should rise, was but for their lives; and the use cannot make the estate larger than the limitations: As 3. Eliz. Dyer 186. where Land was given to two for their lives, To the use of another for his life; If the Lessors dye, the use to him to whom it is limited, is determined. But Jones, Whitlock, and my self, upon the first motion, conceived, That there is difference where an Estate is limited to one, and the use to a Stranger, there the use shall not be more than the Estate out of which it is derived; But not when the limitation is to two, Habendum to them, to the use of the heirs of their bodies, This is no limitation of the use, nor is the use to be executed by the Statute; But it is a limitation of the Estate to them and the heirs of their bodies; and they are in by course of Common Law. And so it shall be taken as a limitation to them and the heirs of their bodies, remainder to the other and the heirs of the other, That the Dred may be construed according to the intent of him that made it. And Jones said, That he had known this to be so adjudged in Wales before this time; Whereupon the Court would further advise. Et Adjournatur.

The King *versus* Maynard.

Information. For ingrossing one hundred Bushels of Salt, to sell again, contrary to the form of the Statute of quinto Edvardi sexti, cap. decimo quarto. Upon the Declaration it was demurred: And argued by Noy and Mason, That this Information is not maintainable; First, Because Ingrossing is no offence in it self, nor Forestalling and Regrating were not in themselves offences punishable before the Statute; Nor is ingrossing in it self unlawfull, but by consequence, or by reason of the things bought and made dearer, which ought to be shewn in the Enditment or Information. Secondly, Because it is not any vicual within the words or intent of the Statute; For it is not Vicual, but only Condimentum, and for preservation of Vicual: And he cited a Record Pasc. 18. Eliz. adjudged, That buying of Barley and converting it into Salt, and selling it, was no offence punishable in a Major, who sold it; nor made him to be a Vicualler (the Major being prohibited to sell Vicuals:) And vicesimo Jacobi, adjudged likewise, That Hopps were not Vicuals within the Statute: And Pasc. 15. Jacob. 101. 36. adjudged, That buying of Apples to sell again was not within the Statute of quinto Edvardi sexti: And where it is mentioned 13. Eliz. cap. 25. That the Statute of quinto Edvardi sexti doth not extend to buying of Oyles, Wine, and other Merchandise, except Fish and Salt; it is to be intended that was not in the point of Ingrossing, but for Forestalling and Regrating, which

which is prohibited. And it would be a great inconvenience, if Salt should be within the Law to be vicuals, to be prohibited to be ingrossed; for then it should extend to those that carry Salt in Wains to be sold, And would enforce every one to buy Salt by the bushel or peck at Ships, or Salt pits, which the Law never intended, But the Law intends those things, which are sold in great quantity, usually at every Market in every County, as Corn, Cattle, Butter, Cheese, &c. But if any ingross all the Salt with an intent to sell it at his own price, and at unreasonable prices, he may be thereof endicted as for an offence at the Common Law, and if it be found, he is finable, as appears by a Record, Pasc. 43. Ed. 3. rot. 19. shewn in Court; Whereupon it was adjourned.

13. **T**Respass. By a Plaintiff being a *Feme sole*. The parties being at issue and tryed by Nisi prius, and Verdict for the Plaintiff, and damages and costs. The Defendant, *al jour in Banco*, pleads, That after the Verdict, and before the day, the Plaintiff took to husband one J.S.; And she being married demanded Judgement, &c. And thereupon it was moved by Rolles, That this being a Plea arising after the Verdict, and before the day in Banco, cannot be pleaded, but prayed to have it disallowed, and that she should have Judgement; For the Defendant hath no day to plead it. And of this opinion was the chief Justice and myself, *cæteris absentibus*; Whereupon Rule was given, That this Plea should be *ousted*, And the Plaintiff should have Judgement unless other matter should be shewn, &c. Vide 4. H. 4. 3. 21. H. 6. 10. 21. H. 7. 33. 5. H. 7. 40.

The King and Barnes *versus* Hill and Windfore.

14. **I**nformation. Upon the Statute *tricesimo secundo Henrici octavi*: For buying of Titles of one who had not been in possession for one year, nor had any Reversion or Remainder. After Verdict upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgement: First, Because he recites the Statute of *tricesimo secundo*, and mis-recites it in the date and in the continuance; For he recites it to be at a Parliament *Inchoat. duodecimo Aprilis*, and continued usque *vicefimo quinto Martii* following, which is a misprision in both: For although the second Session of the said Parliament began the twelfth of April, yet the Parliament began the twenty eighth of April *tricesimo Henrici octavi*, and the second Session began the twelfth of April *tricesimo primo Henrici octavi*; And the continuance by prorogation, was not untill the twenty fifth of March, but untill *vicefimo quinto Maii & ab inde usque Julii*, and then dissolved; Wherefore for this misprision, although it be a general Act, and recited where it needs not to be recited, yet that misrecitall makes it ill, Vide Plow. 78. But Rolles for the Plaintiff said, That although the Statute is misrecited,

misrecited, yet it is not material; For he doth not alledge, That it is an offence against the Statute aforesaid, for then he had tyed it to the Statute recited: But it is alledged, That he bought pretended Rights, contra formam Statuti in hujusmodi casu editi prout. But the Record being viewed, it was, That the Defendant Statutum prædictum minime curans, and relied upon the Statute recited; And there is no such Statute, &c. The second exception was, because it is alledged, That the Defendant Hill, not being seised of such Tenements, nor having a Remainder or Reversion therein, conveyed and granted tricesimo primo Octobris, quarto Caroli, those Tenements by way of maintenance and Champarty to the said Windfore; and for confirmation of the said conveyance, The said Hill and Susan his wife, by fine, Hillary quarto Caroli, granted the said Tenements to Windfore, and doth not aver in fact, That it is a pretended Right, &c. as he ought to do; For that is the point of the Action. The third exception, Because the value of the Land at the time of the Fine was 800 l. And he doth not shew what was the value of the Land at the time of the bargain of those Tenements: And it may be, they were of better value at the time of the fine, than at the time of the grant, And the grant of them is the offence. The fourth exception, Because the Verdict finds Hill and his wife guilty, and the wife was not party to the suit; Wherefore, &c. And the whole Court conceived, That these defaults in the Information made it ill, and that the Verdict was ill. But they would advise thereupon.

Mathews *versus* Whetton, Hill. 4. Car. rot. 496.

TRESPASS. Upon a special Verdict, the case was, A *Feme Coppyholder* for life, takes *Baron*. The *Baron* makes a Lease to one vicesimo quinto Martii, tertio Caroli, by Indenture for a year. And by another Indenture dated the same day and year, makes a second Lease to the same party, for a year, to commence vicesimo septimo Martii, after the end of the said first Lease; And by a third Indenture bearing date the same day and year, makes a Lease to him for a year, to begin the twenty ninth of March, next ensuing the end of the second Lease; and so betwixt each Lease two dayes, betwixt the beginning of the new Lease and the end of the former. And after the *Baron* surrenders his Coppyhold to the Lord, who enters and lets to another for forty years. And after, during the second Lease, the first Lessee enters, and the Lords Lessee ousts him; And if the Entry of the Lords Lessee be lawfull, &c. They pray the discretion of the Court, &c. And now Rolles argued for the Plaintiff, The first question he made, was, Whether the first Lease be a forfeiture? And he argued, That it should not be a forfeiture; For by the Law of the Land, every Coppyholder may make a Lease for a year without forfeiture; and here is but a Lease for one year; And although it may be objected, It is a devise

15.

to avoid a forfeiture, and *Covine & fraud*, which the Law will not favour: Yet he said, Fraud and practice shall not be intended, unless it be found. The second question, Admitting it be a forfeiture, yet the Lord taking a surrender and not entering for the forfeiture, but making a Lease for years, his Lessee shall not enter for the forfeiture: For the Lessee cannot, when the Lord allows thereof. But Grimston for the Defendant argued, That it is a forfeiture; For the three Leases being all made at one time, shall be intended one intire contract, and not warranted by the custome, But is fraud and practice apparent to deprive the Lord of his forfeiture, And this *Covine* needs not to be found, As a Lease for three hundred years is *Mortmain*, And a Joyntress within the Statute of undecimo Henrici septimi, makes a Lease by fine for five hundred years; This is a forfeiture as well as an Alienation of the Freehold of the Land; For it is an equal mischief, And denyed, That a Coppyholder may make a Lease for a year by the Law of the Land, and the general Custome of the Realm; For he ought to have a special Custome, otherwise it is not good, unless it be for the Cryal of a Title, which hath been allowed, Because it is for reducing a Right, and for the Lords benefit. To the second he said, Admitting it is a forfeiture, yet the Lords acceptance of the surrender, not knowing of the forfeiture, is no dispensation therewith, and consequently that the Lords Lessee hath a good Estate and Right in him, for which his entry is lawfull. And Jones, Whillock, and my self, were of that opinion; Whereupon a Rule was given upon the first argument, That Judgement should be entred for the Defendant, unless other cause was shewn. And another day being moved again, Richardson chief Justice being then present, although he doubted at the first, For the second point, It was adjudged by his consent for the Defendant.

Hollyday *versus* Oxenbridge.

16. **T**RESPASS of Assault, Battery, Wounding, and Evill intreating, at London, &c. The Defendant pleaded, quoad the wounding Not guilty, quoad residuum of the Trespass he pleaded, That *die ante tempus quo*, &c. The Plaintiff, apud Bedington in Comitatu Surrey, communiter usus fuit an ill Trade called cheating at play of divers the Kings Subjects with false Dice, and defrauding them of their money; And for the using of his said ill Trade, wandring up and down the Countrey, to find out persons ineexpert at playing at such games, to deceive them of their money. And in his such wandring the Country, to such intents, tempore quo, &c. came to the house of Sir Nicholas Carew at Bedington aforesaid, to find any whom he might by playing with false Dice despoile of his money: Where finding the Defendant and one William Arnold in such play unexpert, desired them to play with him in the said house; Whereupon the Defendant, and the said William Arnold

Arnold not suspecting any hurt or deceit, prædicto tempore quo, &c. play'd with the Plaintiff in the said house of Sir Nicholas Carew at Dice for money, (the said Sir Nicholas being in the house, and a Justice of Peace of the said County) And the said Plaintiff playing with the Defendant and the said William Arnold with false Dice, subtilly conveyed by the Plaintiff (divers summs of the Defendants money, falso & fraudulentè depredatis) would presently have departed from the house and sought to escape: But the Defendant knowing certainly, That he was deceived by the said false Art of cheating with false Dice, prædicto tempore quo, &c. Molliter manus imposuit upon the Plaintiff to bring him before the said Sir Nicholas to be examined concerning the said offence: And he examining and finding him upon his examination various and uncertain in his answer, bound him by recognisance to appear at the next Sessions for the Peace of the County of Surrey; at which Sessions he appearing, was indicted and convicted of the said offence, which said, imposing of his hands and bringing him before Sir Nicholas Carew, ex causa prædicta fuit residuum transgressionis prædictæ; And Travers the Trespass in London or elsewhere, except at the said house of Sir Nicholas Carew. Upon this Plea the Plaintiff demurred. And now Germin for the Plaintiff moved, That the Plea was not good; for one cannot without an Officer for any cause, and that upon his own suspicion only, arrest or stay any person unless in felony, especially in his own case; Wherefore, &c. But all the Court (the chief Justice being absent) held the Plea to be good: for it is shewn, That he was a common cheater, and that he cozened with false Dice, and therefore the Defendant led him to a Justice of Peace, being in the same house: And it appears by the Plea, That there was good cause of staying him; for he is afterward indicted and convicted of that offence; And it is pro bono publico, to stay such offenders: And the cause of the said Arresting, Staying, and bringing him before a Justice of Peace, being by demurrer confessed to be true, They held it to be a good Plea; And that the Plaintiff had no cause of demurrer; Whereupon, Rule was given to have Judgement entred for the Defendant, &c.

Lakins versus Sir John Lamb and Holt.

Quare Impedit. Of the Church of Segrave in the County of Northampton. The Plaintiff intitles himself by grant of the next avoidance. Sir John Lamb pleads to the Issue Non concessit, as the Plaintiff Counts; And issue being joyned, it was tryed by Nisi prius. Holt the other Defendant pleads a Plea, whereupon it was demurred: And the Verdict being found for the Plaintiff in Summer Assise, and the Postea being returned at Octabis Michaelis, the entry was, Curia adversare vult of the Judgement upon the Verdict and Demurrer: And day was given unto the Plaintiff and Holt, usque Octabis Hillarii; and then Judgement was gi-

17.

ven for the Plaintiff, as well upon the Verdict as upon the Demurrer. And because no day was given to Sir John Lamb, against whom the Verdict is found, it was by Mr. Grimston assigned for error: For that the Judgement not being given the same Term in which the Posita was returned, but at another Term, day ought to have been given to all the parties, and therefore it is a Discontinuance; and Discontinuances after Verdicts, are not aided. But all the Court held, It was not any discontinuance: For the Verdict being found against Sir John Lamb, he is out of the Court, And no day shall be given to a Defendant against whom a Verdict is found: For he hath no day in Court to plead any thing. But in this case day is only to be given to the party who is to plead to the Demurrer. And divers precedents were shewn here in the old and new book of Entries, where the entry is only in such manner; wherefore it was held no Error. Afterwards Judgement was affirmed.

Mot and Alice his Wife *versus* Butler. Trin. 7. Car. rot. 5.

18.

Action for words. Whereas there was communication betwixt the Defendant and J. S. of one Sibill Goodwin and of Alice the Plaintiff, That the Defendant spake these words of the said Sibill and the said Alice: Sibill Goodwin (innuendo the said Sibill Goodwin) hath stoln away such Goods (mentioning what they were;) And she (innuendo the Plaintiff) was privy and consenting thereunto. After Verdict, upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgement, That the communication being of two, and not specially of Alice, But she, innuendo the Plaintiff, there cannot be any reference to the Plaintiff: So the words do not appear to be spoken of her; and the innuendo will not help: And cited for that Co. 4. fol. Roberts Case. But the Court held, It was certainly and sufficiently alledged: For the words are to be referred singula singulis. And when it is said Sibill Goodwin stole such Goods, and she (innuendo the Plaintiff) was privy and consenting, &c. this word (she) cannot be referred to Sibill, but to the Plaintiff. And for the words, That she was privy and consenting to the stealing of the Goods, there is good cause of Action: For she accuseth her to be Accessory; Whereupon it was adjudged for the Plaintiff.

Jaxon *versus* Tanner.

19.

Action for words. For that he said of the Plaintiff, being a Merchant, Thou art a Rogue and beggarly fellow, and I shall prove thee a Bankrupt before the next Term: and for that he said afterwards, upon the same day, to one John Harris of the Plaintiff, Trust him not, for he will be thy undoing. The Defendant pleaded Not guilty; and it was found for the Plaintiff; and intire damages given by the Jury. Whereupon it was moved in arrest of Judgement

ment by Ho: born, That these words are alledged to be at several times: And for the words spoken the first time, the Action may lye; but for the words spoken afterwards, the Action lies not; and damages being intire, there can be no Judgement: For the Court shall intend, that damages were given as well for the second as for the first speaking, when both issues are found for the Plaintiff. But for words spoken at one time, if damages be found, the Court shall intend they were given for the words only which are actionable, and not for the other. But the Court conceived in this Case, That the words spoken at the second time are as well actionable as the words at the first, and aggravates the first words: For when he first called him a Bankrupt, and I will prove him a Bankrupt, &c. it lies for these words (but not for the words Rogue or Beggarly fellow;) And when afterwards he said to another, Trust him not, for he will undo thee, they tend to the same sense: Whereupon Judgement was given for the Plaintiff, unless other matter were shewn to the Court. And being another day moved again, Richardson, chief Justice, conceived, there was not any difference betwixt these words, I will prove thee a Bankrupt, and I shall prove thee a Bankrupt by such a time: And he held, That the Action well lies for any of the said words.

Facy *versus* Long.

Prohibition. A question was moved, Whether Tythes shall be paid for the depasturing of Sheep fed for ones Family only, and not to be sold? For the Prescription was, that he paid the tenth pound of wool of all Sheep sold there and depastured. And Maynard moved, That notwithstanding the payment of the tenth fleece, he should pay for the Pasturage of his Sheep eaten in his house. But all the Court held, That Tythes shall not be paid for any Cattle eaten in the Family, no more than for Cattle reared for Pale or Plough: And a president was cited Hillary nono Jacobi, that so it was resolved.

20.

Margaret Hinde *versus* Episcopum Cestriae.

Prohibition. Because the Defendant sued in the Consistory Court of Chester, before the Commissary there, for a Mortuary, after the death of William Hinde, a Priest of the said Diocese, surmising, That by Custome there he ought to have for a Mortuary after the death of every Priest dying within the said Archdeaconry of Chester, the best Horse or Hare, his Saddle, Bridle, Spurs, his best Gown or Cloak, his best Hat, his best upper Garment under his Gown, his Cypset, his best Signet or Ring, as to the Bishop de debito consuere fore supponitur, and recites the Statute of vicessimo primo Henrici octavi, concerning Mortuaries. And she avers that there is no such Custome there; and that she had

21.

had paid a Portuary to the Parson of Bomberly : And that after a Prohibition the Defendant had prosecuted his Suit there. Noy, Attorney General, moved for the Defendant, That consultation should be granted. The first question was, This suit being for a Portuary in the Archdeaconry of Chester, and the doubt, whether there were a custome in that place to have such things for a Portuary, whether this be just cause of Prohibition : Or that this suit being for a Portuary is merely tryable in the spiritual Court : And it was alledged on the Defendants part. That this is merely tryable in the spiritual Court upon the Statute of Artic. Cleri, which saith, That where a suit is for a Portuary, Prohibition shall not be granted : And in Fitzb. Nat. Brev. 53 and 51. 10. H. 4. 2. where custome is alledged for the payment of a Portuary, it is said this custome is tryable in Court Christian : And 13. R. 2. Jurisdiction 20. Kellaway fol. 110. where suit is for a Portuary, consultation shall be awarded. But Calthrop for the Plaintiff moved against it and said, True it is, before the Statute of vicessimo primo Henrici octavi if there were a suit in Court Christian for a Portuary, consultation should be granted ; Vide Doct. & Student fol. 176 and the book of Entries ; but the course is otherwise since that Statute. But the second question, Whether consultation shall be granted upon a motion, without answering to the Prohibition : And that was moved by Noy, That it shall ; Because the suit being for a Portuary, there is no cause of Prohibition ; therefore consultation should be granted. And of that opinion was Jones and Whitlock, That a Prohibition ought not to have been granted, it being a suit for a Portuary ; and although it was alledged, It is now grantable upon the Statute of 21. Hen. 8. they conceived, That by the proviso therein, Portuaries shall be paid in the Archdeaconry of Chester, as before they have been accustomed ; so it is out of the Statute : And the custome for payment of Portuaries being in question, is tryable in Court Christian : And although Prohibition hath been unduly granted, yet it is no discretion in the Court to grant a consultation upon motion without answering. But Richardson and my self held, That no consultation ought to be granted ; For the surmise in the Prohibition is good, That there is no such custome, to have such Fees for Portuaries, as is surmised ; and that may well be tried by the course of the Common Law : For now the Statute appoints what shall be paid for Portuaries : And that in the said places, in Wales and Archdeaconry of Chester, such Portuaries shall be paid as have been accustomed, which is issuable and tryable at the Common Law, especially as this case is, wherein the Plaintiff pretends and surmiseth, that he paid the Portuaries to the Parson of Bomberly, in which Parish the said Priest inhabited : And that there is no such custome, he should pay it to the Archdeacon. Secondly, We held as this Case is, no consultation ought to be granted upon motion, without answering to the Prohibition ; Because the Plaintiff

tiff in her Declaration upon the Prohibition shews, That the Defendant hath sued after the Prohibition, which is a contempt and ought to be answered, But peradventure in some Cases, when the Prohibition appears in it self to be unduely granted, the Defendant before appearance, having committed no contempt in prosecuting thereof, may move to have a consultation; Whereupon it was appointed, that the Defendant should plead or demurr, And then the Court would give Judgement upon the Record before them, &c.

Mills versus Mills.

Action sur le Case in nature del conspiracy. Whereas the Defendant with J. S. falso & malitiose conspired to procure him to be indicted of such a Felony, That the Defendant falso & malitiose, such a day procured him to be Endicted, whereby he was much vexed, &c. After Verdict, in arrest of Judgement, Littleton moved, That this Action lies not, Because he did not sue the other as well as the Defendant; For conspiracy ought to be against two, sed non allocatur: For Action upon the Case may well be against one of them; Whereupon it was adjudged for the Plaintiff.

22.

Walsh versus Bishop. Hill. 6. Car. rot. 954.

Error. Of a Judgement in the Common Bench, in Trespass of Battery against two. They plead several Pleas, The one Not guilty, The other Justification; whereupon several Issues were joyned, and the Jury found both Issues for the Plaintiff, and assess several damages, but joynt Costs. And afterwards the Plaintiff caused a Nolle prosequi to be entred against the one, which was entred accordingly; and takes Judgement against the other for the damages found against him, and the costs. And the Error assigned by Littleton was, Because a Nolle prosequi against the one before Judgement entred is quasi a release unto him, which shall inure to the other, and abate the Writ for both. But if he had prayed Judgement against the one, and had it, then he might enter a Nolle prosequi against the other. And that entry of a Nolle prosequi against the one after Judgement, shall not abate the Writ, nor be a release to the other: and for that was cited 14. Ed. 4. 6. But it was answered by Mr. Grimston, That this Nolle prosequi is not a release in it self, but an acknowledgement, That he will not proceed as against the one; which the Plaintiff may well do in Trespass, where the Defendants sever themselves by pleading, and there be several Verdicts against them; and so there be divers presidents where Nolle prosequi's are entred as well before Judgement as after; and so is the old Book of Entries: Whereupon the Court would advise.

23.

Robinson *versus* Cleyton. Trin. 6. Car. rot. 1343.

24. **S**Cire facias. To have Execution upon a Judgement in Debt. The Defendant pleads, That at another time the Plaintiff had sued execution by a Capias ad satisfaciendum, and the Defendant was taken in Execution. The Plaintiff replies, That true it is, he sued a Capias ad satisfaciendum, and the Defendant was taken thereupon, But he presently rescued himself and escaped. The Defendant demurs thereupon. And all the Court conceived, That the Replication was good: For the Plaintiff, not having the fruit of his Execution, may have a new Execution; and it is not reason the Defendant should take advantage *de son tort demesne*: And as there is no cause for the Defendant to have an Audita Querela when he is escaped and taken again, unless it be for a voluntary permission by the Sheriff; so there is not any bar for him to have new Execution: And although it is no good return upon a Capias ad satisfaciendum, That the Defendant rescued himself (for the Sheriff at his own peril ought to have kept him) nor any Plea in Debt upon an escape; yet the party himself shall never take advantage of his own tortious Act. And as it was said, That it appears the Plaintiff might have his remedy as well against the Sheriff as against the Defendant; so it was answered, That both not take away his remedy against the party who escaped, unless the Defendant shews, That the Plaintiff had sued the Sheriff and recovered against him; And it may be the Sheriff here is dead, and then no power to sue his Executors: Wherefore, it appearing that the remedy remains against the party himself, Rule was given, That Judgement should be entered for the Plaintiff, unless, &c. 29. Ass. 41. Co. 3. 44. & 52.

Wells, Administrator durante minore ætate of J. S. *versus* Some.

25. **A**ccount. Against the Defendant as Bayliff and Receiver, and shews only, That he was Bayliff of such a Baron, &c. The Defendant pleads to the Issue, and found against him. And in arrest of Judgement the first exception taken, was, Because he doth not shew that J. S. is within the age of seventeen years; and it may be he is under age, and yet above the age of seventeen years; sed non allocatur: For it shall not be intended, unless it be shewn, that he was above the age of seventeen years, when the other bar admitted him to bring the Action, and pleaded to the Issue. The second exception, That the Declaration is not good, was, Because he charges him by the name of Bayliff and Receiver, and afterwards doth not shew any charge against him as Receiver, sed non allocatur: For it is the more for the Defendants benefit; Whereupon it was adjudged for the Plaintiff.

Termino

Termino Hillarii, anno septimo Caroli Regis,
in Banco Regis.

Milles *versus* Milles.

Assumpfit. For that the Defendant, in consideration of Marriage, promised to the Plaintiff twenty pounds, to be paid in manner & form following, viz. ten pounds at Michaelmas 1631. and ten pounds residue at Michaelmas 1632. And for the non-payment of the first ten pounds he brings the Action. The Defendant pleads non Assumpfit, and found against him, to his damages twenty pounds, and costs two pounds thirtē shillings four pence. And it was moved by Mr. Grimston in arrest of Judgment, first, That the Action lies not till after Michaelmas 1632. and compared it to an Action of Debt grounded upon a single Bill for ten pounds to be paid, viz. five pounds at our Lady-day, and five pounds at Michaelmas: Debt lies not until the last day. Secondly, Here be damages given for the last day which is not yet come. But Jones, Whitlock, and my self (Richardson chief Justice being absent) agreed, That the Action well lies before the last day, being an Action upon promise or Covenant: For the breach is immediately for the first 10 l. not being paid at the day, and for this breach the Action well lies. But we held it to be otherwise in Debt, the Contract or Bill being entire. Secondly, we agreed, That the damages of twenty pounds shall be intended given for the first ten pounds, And that he should have so much damages for non-payment thereof only, without any respect to the ten pound which is not yet due: Whereupon it was adjudged for the Plaintiff. Vid. 2 & 3 Ph. & Mar. Dy. 113.

Cooks *versus* Douze.

Error of a Judgment in Winton. Where the Plaintiff declared, That he lent to one Wheeler twenty pounds at the Defendants request, And that the Defendant, in consideration the Plaintiff would rest content and forbear the said money per paululum tempus, promised upon request he would pay; And alledges in fact, That he forbore per paululum tempus, and required payment; And the Defendant had not yet paid, although he required payment at such a day. After non Assumpfit pleaded, and Verdict and Judgment given for the Plaintiff, it was assigned for Error, That to forbear per paululum tempus, is not any consideration, because there is not any certainty therein: And Foster said, There be divers precedents, That it hath been adjudged to be ill. But all the Justices (absent)

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sente Richardson) held, That it was well enough; For when the money was lent to Wheeler, and long forborne, and the Plaintiff upon the Defendants request agreed for a longer time, and to accept of the payment from him when he should be required; and alledges in fact, That he forbore till the day of his Action, and that he requested, &c. It is sufficient; Whereupon Rule was given, that Judgment should be affirmed.

Berry *versus* Heard. Hill. 19. Jac. rot. 1444.

3. **A**ction *sur Trover & Conversion*. Of a load of Bark or rinde of Oake. Upon Not guilty pleaded, a special Verdict was found, That this bark was the bark of an Oake being Timber, growing in such Land, whereof the Plaintiff was seized in Fee, and had let the Land whereupon the Tree grew to L. S. for years; And that the Defendant, during the said Term, (which yet continues) entered and cut down the said Tree, being a Timber-tree, and carried away the said load of bark thereof, and converted the same to his own use. And if, &c. The sole question herein was, If a Stranger cuts down a Timber-tree in the time of Lease for years, and carry that or the bark thereof away, Whether the Lessor, during the said Term, may have an Action of Trover for it, or be put to take his remedy against the Lessee by an Action of Waste; And the Lessee to have his remedy by Action of Trespass or Trover against him who cut it down? Or whether the Lessor, at his election, may punish the one or the other? And this Case being long depending, and divers arguments therein before I came to the Bench, and the Judges differing in their opinions, it was argued after I came to the Bench, and Jones and Whitlock said that they always were of opinion, That the Action well lies for the Lessor, And that he hath election to sue the Lessee for the Waste, or him who cut down the tree: For the tree being Timber, the general property is always in the Lessor notwithstanding his Lease, And the Lessee for years hath but a special property therein, to have the shadow and fruits thereof as long as it is growing, and not otherwise: And when it is severed from the Land, the property which the Lessee had therein, is lost, And then the property thereof is only to the Lessor; so as he may have an Action for the carrying it away, or Action *sur Trover & Conversion*: And that such property which he hath by the Common Law, always remains in him, notwithstanding the Statute of Gloucester, which gibe him the Action of Waste to punish such cutting down: And they said, That Lee chief Justice was of their opinion. But Dodderidge was always of the contrary: and they said, A Rule was once given that Judgment should be for the Plaintiff; and they marvelled it was not entered. And now Richardson chief Justice said he was of their opinion, That the property of the Timber-tree, when it is cut down, is no longer in the Lessee; for his interest is in it only during the time it is growing upon the Land, and that afterwards it remains only

only in the Lessor, so as he alone shall have an Action of *Trover* for the carrying it away. But I was always of the contrary opinion, That the Lessee solely, during the term, ought to have an Action for the carrying away of it, and not the Lessor: For the possession and property is vested in him during the term, and is not lost by his cutting down, nor by the cutting down of a Stranger; And that he is chargeable in an Action of *Waste* to answer treble damages to the Lessor; and so the Lessor having sufficient remedy, it is reason the Lessee should have the Action against him who cuts it down and carries it away, to have recompence; And the recovery by the Lessor in an Action of *Trover*, is no barre for the Lessee to plead in an Action of *Waste*: Nor is it reason a recovery of single damages against him who cut down the said Timber, should be a barre in *Waste*, where he is to recover treble damages; therefore the Lessor, during the term, ought to have his remedy only against the Lessee, And he over against him who cut down the said tree. But notwithstanding, upon their three opinions, it was adjudged for the Plaintiff. See *Cok. 4. 62. Cok. 5. 76. Cok. 11. 48. & 81. Dy. 90. 44 Ed. 3. 5. 10 H. 7. 2. Cok. Lit. 220.*

Walsh versus Bishop. (quod vide ante pag. 239)

WAs now argued again by Littleton, Recorder of London, for the Plaintiff in the *Writ of Error*, and by Henden Serjeant for the Defendant. The errors insisted upon were, first, That the Jury ought not to have given several, but joyned damages. Secondly, That the entry of a *Nolle prosequi* before Judgment is quasi a confession of his Action to be false against one, or a release unto him, which being before Judgment is, as it were, a release to both. But the Court (absente Jones) conceived, That there was not error in either of them: For first, when the Plaintiff hath relinquished his suit against the one, although in truth there ought to have been inquiry but once of the damages, and not severally, yet it is not material when no advantage is taken thereof. And as to the second, It is not a confession that his *Writ* is false, nor an absolute release to the one, But it is, as it were, an Agreement, That he will not proceed against the one; And his acknowledgment is an absolute barre as to him, and proceeding may be against the other. As if one pleads a *Plea*, and there is a demurrer thereupon, and the other pleads to the Issue, and it is tryed, It is an usual course to enter a *Nolle prosequi* against him who pleaded the *Plea* whereupon the demurrer was, and to pray Judgment against the other. So where they sever themselves by several *Pleas*, he may enter a *Nolle prosequi* against the one, and have his Judgment against the other: And divers precedents being shewed on both sides, that such Judgments have been so entred, the Judgment was affirmed. Vide 18 Ed. 4. 26. 5 H. 5. 1. The Book of Entries 585. 589. 5 H. 7. 24. 11 H. 7. 5.

Copland *versus* Pyatt, Trin. 6. Car. rot. 687.

5. **E**jectione firmæ. Upon a Special Verdict the case was, That William Bertram seised in fee, having three daughters, by Indenture betwixt him and Robert Bagley, in consideration of 400 l. paid by the said Robert Bagley, and in consideration of a marriage had betwixt Robert Bagley son and heir of the said Robert Bagley, and Margaret eldest daughter of the said William Bertram, and preferment of the blood of the said William Bertram, Covenanted to stand seised, to the use of the said Robert the son, and the said Margaret his wife, and the heirs of her body, and for default of such issue, to the use of his other daughters, and the heirs of their bodies, the Remainder to the heirs of the said William. The husband dyeth having no issue, and Margaret his wife, by Fine conveyed it to the Defendant, upon whom the issue entred, as for a Forfeiture by the Statute of 11. H. 7. and whether it were a Forfeiture or not, was the question; and it was resolved, that she was not a Jointress within that Statute, notwithstanding the 400 l. paid by Robert Bagley the father; for the Land first moved from William Bertram the wifes father, and the preferment of the blood of William Bertram, shews the intent, that the husbands heirs should not be preferred, but the wifes, for the meaning of the makers of that Law, was only to disenable women who have any Estate in Dower, or for life, or in Tayle, jointly with their husbands, or only to themselves of the Inheritance or Purchase of their husbands, or given to them by the Ancestors of their husbands, or other persons seised to the use of such husbands or their Ancestors, when they become sole, or with any other after-taken husband, from making such alienations, whereby the heirs of such husbands might, and before the making of that Law, were frequently disinherited: But in this case the advancement is by the Ancestors of the wife, and is not of the purchase of the husband or his Ancestors, nor assured by the husband or his Ancestors. And in this case the Bishop of Exeters case was cited, who in consideration of kindred to the woman, and service done by the man, gave certain Lands to them in tayle; and it was adjudged, that the wife, after the death of the husband, had no Estate within the said Statute of 11. H. 7. and that she might sell it, because the Land came not from her husband nor any of his Ancestors, nor from any seised to the use of her husband or his Ancestors. Vide Crooks 2. Part of his Reports, Termino Trinitatis, 5. Jac. Banc. Regis, in the case between Ward and Walthew. And therefore it was adjudged for the Defendant, Vide Mich. 19. Jac. Kinaston *versus* Lloyd. Et Pasc. 16. Jac. B.R. Kirkman, *versus* Thomson.

Meredith *versus* Joans, Pasc. 6. Car. rot. 53.

6. **E**rror of Judgment in Flintshire. The Error was assigned in point of Law, viz. That Judgment was given there upon a Special

Special Verdict, where it was to have been for the Defendant. And by the Court, that it was to be an Estate Tail, and not to Baron and Rem, Habendum to them and the heirs of their bodies. And whether it were an Estate for Life or for Years, it was adjudged to be an Estate Tail. And the Recorder of London for the Plaintiff, and the Recorder of London for the Defendant. And all the Court (Judge Richardson) held, That the Judgment ought to be affirmed. For they conceived, That this limitation in the use of the Granters and the heirs of their Bodies, is as a limitation of the Land itself, being all to one person; And is as if it had been said, Habendum to them and to the heirs of their Bodies; And not like to the case 2 & 3 Eliz. Dyer 186. For true it is, when the Estate is limited to one or two, to the use of others and their heirs, the first Estate is not enlarged by this Implication, and the use cannot pass a greater Estate. But here when the Grant and Habendum convey the Estate, and the limitation of the use is to the same person, that shews the intent of the parties, and is a good limitation of the Estate. For it is not an use divided from the Estate, as where it is limited to a stranger, but the use and Estate go together; Wherefore it is all one, as if the limitation had been, to them and the heirs of their Bodies. And Jones said, That he knew many Conveyances had been made in this manner, and twice brought in question, and adjudged to be an Estate Tail; Whereupon Judgment was affirmed.

Swain and others versus Stephens, Hill. 6 Car. rot. 1243.

Action sur Trover & Conversion. Of a Ship and nine pieces of and declares, That primo Martii, vicesimo primo Jacobi, he was possessed, and the same day lost them, which came to the Defendants hand, who tertio Octobris, tertio Caroli, converted them to his proper use. The Defendant pleads the Statute of vicesimo primo Jacobi, of limitation of Actions; And that the twentieth of March, decimo nono Jacobi, causa Actionis accrevit; So as not only this years and more are incurred since the Parliament, But also six years, after the conversion before any Action commenced. Et hoc, &c. The Plaintiffs reply, That they were possessed of the said Ship as of their proper goods, and so being possessed before the twentieth of March, decimo nono Jacobi, viz. primo Martii, decimo nono Jacobi, They agreed at London aforesaid, in Parochia & Warda prædicta, that the said Defendant, as their servant, should transport the said Ship and Goods to T. in Spain, being parts beyond Seas, and should afterwards restore them unto the Plaintiffs upon request, Whereupon the Defendant taking the said Ship, the said primo die Martii, decimo nono Jacobi, transported her to the parts beyond Seas, viz. to T. And vicesimo Martii, decimo

decimo nono Jacobi, there sold the said Ship and Goods to persons unknown, and converted them to his proper use. And that the Defendant after the said conversion, remained in partibus transmarinis usque primum Maii, primo Caroli, By reason of which stay, they could not sue him per Legem Terræ: And that primo Maii, primo Caroli, he returned; Whereupon the first of October, tertio Caroli, apud London, they required him to redeliver the said Ship and Goods, which to do he refused. But the said Ship and Goods, Ad-tunc & ibidem, converted and disposed prout superius continetur; Et hoc, &c. And upon this Replication, the Defendant Demurs. And now Henden Serjeant moved, That this Action of *Trover* is not within the Statute, but is omitted; For although at the first the words be, Actions of Debt, Detinue, Actions upon *Trover*, Account, &c. shall be brought within the time after limited, yet in the per-close, Actions *sur Trover* are not mentioned. But all the Court conceived, Although Actions of *Trover* are not mentioned in the per-close; yet the words being, That Actions upon the Case shall be brought within six years, And Actions for words within two years, in those general words of Actions upon the Case, the Action of *Trover* is implied; Wherefore it was not allowed. Secondly, Admitting the Defendant was beyond Seas for six years after the conversion, and did not return into England, The question was, Whether the Plaintiff had not liberty to bring the Action at any time within six years after his return? For the Proviso is on the part of the Plaintiff, if he be over the Sea at the time of the cause of Action, That he shall have time after his return: And by the same equity, it shall be so where the Defendant is over the Seas, and cannot be sued. But that point the Court did not resolve. Thirdly, If this request and non-delivery after his return, be not a new conversion and cause of Action, so that although he was barred before by the Statute of Limitation, Whether he shall not be hereby restored to that Action? And Jones and Whitlock conceived, That he should, and that it may be well intended, the Goods came to his hands again after his Sale; And the demanding them of him, and his denial and conversion, is good cause of Action: But I doubted thereof. Fourthly, It was urged, That here the Replication was a departure from the Declaration; For by the Declaration the Plaintiffs suppose a casual loss and a *Trover* by the Defendant, primo Martii, 21 Jacobi: But in the Replication they suppose an agreement to transport the said Ship and Goods, and afterwards to restore them to the Plaintiffs, and that the Defendant sold and converted them to his own proper use the twentieth of March, decimo nono Jacobi, and so a variation between the Declaration and Replication, in the time and manner how the Defendant had them. Also, by his own confession, the conversion was made above six years before the Action brought. Residuum postea, pag. 333.

Soutley *versus* Price, Hill. 5 Car. rot. 1276.

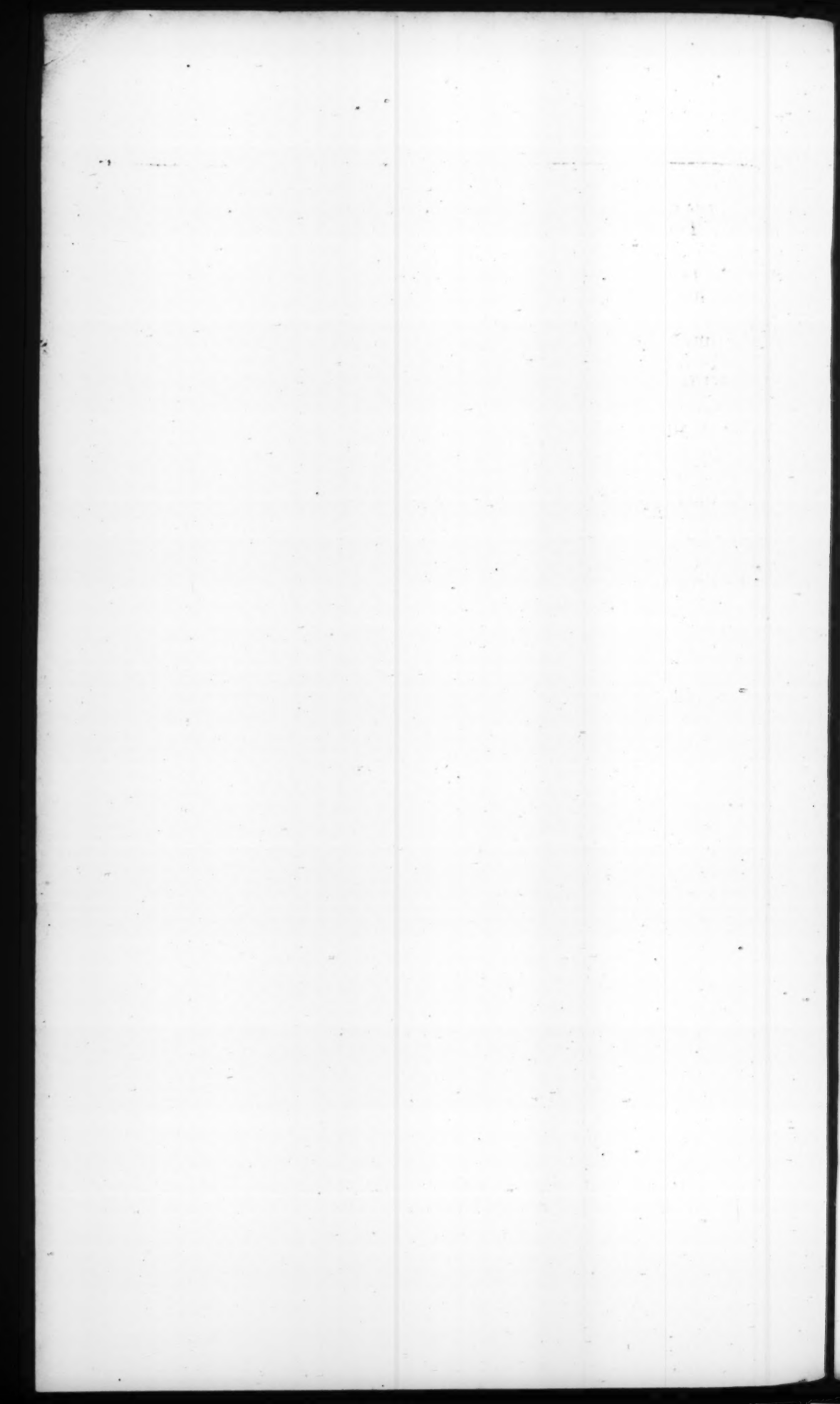
Appeal of Murder. Brought by Writ awarded to the Sheriff 8.
 of Salop, being the next County adjoining to that of Montgomery in Wales, for the murder of her husband at Montgomery, in the County of Montgomery. After Verdict for the Plaintiff, upon Not guilty pleaded, being tried by a Jury of the County of Salop at the Barre; the murder being foul, and the Defendant found guilty: It was moved in Arrest of Judgment, That this Writ of Appeal ought to have been brought in the County of Montgomery, where the Fact was committed, and not in any other County adjoining: And it was several times argued at the Barre, by Henden and Berkley Serjeants and Littleton for the Plaintiff; And by Charles Jones, Serjeant Lloyd and others for the Defendant. And after Argument, all the Court resolved, That the Writ should abate: For it is against a fundamental Rule of Law, That a Tryal for Murder by Appeal, or otherwise should be out of the County where it is committed, as 18 Ed. 3. 32. 11 H. 4. 98. & Stamford fol. 9. And for this cause, it was doubted at the Common Law, where a Troak were given in one County, and death ensued in another County, how it should be tried: And to avoid this doubt, the Statute of secundo Edvardi sexti, was made. But it always was clear, That a Fact in one County ought not to be tried in another; And although it hath been objected, there would be otherwise sayler of Justice, Because in Wales Breve Domini Regis non currit; And this Appeal is quasi for the King, And where the King is party he may always sue in any County adjoining: As in Quare impedit, for an Abbotsion in Wales, because there they cannot write to the Bishop, as undecimo Henrici sexti fol. tertio & sexagesimo primo. Yet it was answered, That Wales was a Realm by it self, and distinct from the Government of England. But afterwards united, and by the Statute of Rutland, appointed by what Lawes it shall be governed: And by the Statute. 27 H. 8. cap. 26. & 34 H. 8. cap. 6. divided into Counties, and expressly therein is set down, how Appeals shall be sued there out of Chancery, and ought not be tried here by Writs of Appeal. But if he were here in custodia Mareschal, Whether he should be sued here by Bill of Appeal, they would not now resolve: And although it was objected, That Writs of Appeal have been brought here for Murder committed in Sandwich, which is within the Cinque Ports ubi Breve Domini Regis non currit, The Writ supposing the Murder to be committed at Sandwich, in the County of Kent: And the Defendant pleading, That Sandwich was one of the Cinque Ports, upon demurrer, the Writ hath been adjudged good. (Note this case was Pasch. 42. Eliz. rot. 236. betwixt Crisp. and Virrall,) And that so it should be here. The Court answered there was a manifest difference betwixt the cases; For here the Appeal was brought within the County of Kent, and it was truly

truly supposed done at Sandwich. And the Cinque Ports, though they be a liberty, made by Act of Parliament, yet always remain parcel of the County; and so the Appeal well brought: But here by the Plaintiffs own shewing, the Act was done in another County out of the County of Salop, Wherefore the Appeal lies not, and the Court also much relied on this, That no president can be shewn, where Appeals have been allowed in Counties adjoining, for Murder committed in Wales: 'Tis true that in vicesimo quarto & vicesimo quinto Elizabethæ, in this Court, A Writ of Appeal was brought against one Thomas in the County of Salop, for Murder in the County of Montgomery, sed nihil inde venit, But divers presidents were shewn to the contrary, viz. one in Trin. 5 Ed. 3. rot. 9. where an Appeal was brought here for a fact in Wales, The Judgment was, That for that cause eat inde sine die, And Trin. 18 H. 6. rot. ultimo, an Appeal of Rape, was brought here for a fact in Wales, and adjudged, That he shall not be put to answer, because it was committed in Wales. And two other presidents were produced, The one Pasch. 10 Ed. 2. rot. 110. The other Pasch. 5 Ed. 4. rot. 34. Whereupon all the Court here resolved, That this Writ of Appeal lies not, and therefore adjudged for the Defendant. Note the Statute of 26 H. 8. cap. 6. allows, That Endowments may be in Counties next adjoining; but there is not any mention therein of Appeals: And for this reason Certioraries have been granted, to remove Endowments out of the grand Sessions; but never Writs of Appeal.

Lancelot *versus* Allen, Trin. 3. Car. rot. 1037.

9. **T**Respas. For entering into an house in Saint Olives Hartstreet, upon Not guilty pleaded, a special Verdict was found, That one Cromer being seised in fee of an house in Saint Swithins, and of divers houses in Saint Olives in London (where the custome being also found, That every Citizen or Freeman may devise his Lands in Mortmain,) devised the Tenement in Saint Swithins to the Parson of Saint Martins Orgars and his successors, to find annually one to sing Mass in the Church of Saint Orgars every day, and that there should be paid unto him ten marks by the year: And he devised his houses in Saint Olives, whereof the Land in question, is parcel to his wife for life, to find an anniverlary, and to expend thereupon, divers summes, amounting to 3 l. 6 s. 8 d. and after her death, to the said Parson and his successors finding the said anniverlary: and further appointed to the Churchwardens 6 s. 8 d. for their pains to see it observed, Et quod superfuierit, over and above the said charges, he wills, shall remain in the hands of the Churchwarden of *S. Martins Orgars*, ad manutenendum Capellanum prædictum, & ad emendandum & reparandum dictam Ecclesiam de *S. Martins Orgars*, & Ornamenta ejusdem Ecclesiæ secundum eorum discretionem: Proviso semper, Quod si contigerit prædict. Terras & Tene-
menta

menta in *S. Swithins* in aliquo casu fore minoris valoris quam decem marcis, per quod Capellanus prædictus ut prædictum est inveniri non poterit: Tunc volo quod totum quod de prædicta annuali summa de decem marcis haberi & levare non poterit, haberetur & levaretur de proficuis Tenementorum prædictorum in *S. Olives* by the said Parson and his successors, ad opus & sustentationem dicti Capellani in perpetuum. And they find, That the Tenements in Saint Swithins at the time of the Will making, and before, were but of the yearly value of 6 l. 5 s. And the Tenements in Saint Olives at the time of the Will, and always after, until the time of the Statute of primo Edvardi sexti, were of the value of 24 l. 10 s. per annum, and that the Priest and the said other uses were imployed and maintained until the making of the said Statute of primo Edvardi sexti, And that the Plaintiff claims as Lessee of the Parson, and the Defendant claims under the Patent of the King, And whether the Parson of *S. Martins Orgars* hath title to those Tenements of Saint Olives, was the question: And after argument at the Barre, it was held, first, by all the Court, That if this Probiso had not been added, the Lands had been clearly given to the King by the Statute of primo Edvardi sexti, as Lands given for the maintenance of a Priest; for the clause, for those Lands of Saint Olives, was limited, Quod superfuert after the Anniversary maintained, shall be ad manutenendum Capellanum prædictum & reparandum Ecclesiam & ornamenta ejusdem Ecclesie. The superstitious use being certain, and the good use, viz. ad reparandum Ecclesiam & ornamenta ejusdem Ecclesie, uncertain. The superstitious use certain shall cause that all shall be given to the King; But Richardson chief Justice, Jones and Whitlock conceived, That by the Probiso, It appears it was his intent, the Priest should have but ten marks, and what was wanting in the value thereof, should be supplied out of the Tenements of Saint Olives; so that nothing is given to the Priest, but the ten marks: Therefore the houses in Saint Olives were not given to the King. But I doubted thereof, conceiving all to be given to the King, for the Probiso doth not alter it; for in the first clause, all the profits of those houses, after the Anniversary paid, is given for the maintenance of a Priest indefinitely, and to the reparation of the Church, &c. And the Probiso doth not abridge it; for that appoints, what is wanting in Saint Swithins shall be made up out of Saint Olives, and so to pay the ten marks first appointed; so as he shall have the said ten marks de certo out of both the said Tenements in Saint Swithins and Saint Olives. But that doth not take away the clause, That the residue of the profits of the Tenements in Saint Olives shall be to the Parson, ad sustentationem dicti Capellani. And of this opinion, was Hide chief Justice when he lived: But it being moved again, in Sir Thomas Richardsons time, he agreeing with Jones and Whitlock in their opinions, it was adjudged for the Plaintiff, That these houses were not given to the King.



Termino Paschæ, anno octavo *Caroli* Regis,
in Banco Regis.

The King *versus* Sir James Wingfeild, and others.

INformation. By the Kings Atturney, against Sir James Wingfeild, Sir Francis Bodenham, James Bedell, Thomas Brady, John Hambden, and John Neale, For that they had made an Assault upon the Sheriff of Middlesex, in serving an Execution upon the said Sir James Wingfeild, by which means he escaped and rescued himself. They all pleaded Not guilty: and now upon the Tryal, all besides Bedell made default, and he appeared: And Noy the Atturney General urged strongly, That it was no reason but that the Default of the others should bind him; for it is one intire suit, and they all have joyned in a Plea, and therefore may not now be severed. But all the Court held, Because the suit was for a criminal offence, although they all pleaded Not guilty, yet it is to every one of them quasi secleral, and the default of one shall not be the default of the others; nor the confession of any of them shall prejudice the others; Whereupon the Enquest was taken by default only against the four, which appeared not: And they all were found guilty besides Bedell, whom the Jury acquitted. And the Kings Atturney now praying Judgment, the Court seclerally delibered their opinions, and gave Judgment, That Sir James Wingfeild, being the principal offender, should pay 500 l. and Brady 500 Marks, because it appeared upon the evidence, he drew his sword and wounded the Sheriff grievously, and by that means Sir James Wingfeild escaped into the said Neals house: and against the said Neale, because he kept out the Sheriff, shutting the door against him, and not suffering him to search for the prisoner, whereby he escaped, 180 l. And against Sir Francis Bodenham, because he was the means of conveying away the said prisoner to Lincolns Inn, 500 Marks: and against the said John Hambden, because he was aiding with the said Sir Francis Bodenham, 200 l. And it was resolved, That such fines assessed in Court by Judgment upon an Information, cannot be afterwards qualified, or mitigated.

The King *versus* the Major and Commonalty of London.

2. **I**Nformation was brought against the Major and Commonalty of London. Whereas they were incorporated by that name, and it was a walled City, and recites the Statute of secundo Edwardi quarti, That the Major for the time, and all who have been Majors, should be Justices of the Peace within the City, and that the Sheriffs are made amongst themselves, and Coroners appointed by themselves; and that by Law they ought to suppress Riots and all unlawful Assemblies: Notwithstanding in June, quarto Caroli, in the day time, That one John Lamb, alias dictus, Doctor Lamb, was slain in a Tumult, and none of the offenders taken, nor any person known or indicted for that Felony. And upon this Information, the Major and Commonalty appeared, and confessed the offence, & posuerunt se in gratiam Curie, &c. For which they were amerced to 1500 Marks; for it was conceived to be an offence at the Common Law, to suffer such a Crime to be committed in a walled Town tempore diurno, and none of the offenders to be known or indicted. Vid. 3 Ed. 3. Coron. 299. 22 Ed. 3. Coron. 238. 8 Ed. 2. Coron. 425. Stamf. fol. 33. Cok. lib. 7. fol. 7. 3 H. 7. 15. Dy. 210. And Noy Attorney General shewed a Record Mich. 18 Ed. 3. rot. 132. an Endowment of a Town in Devonshire, for suffering an Assembly, as it were to hold Assises in mockery of Justice: And 21 H. 6. a Presentment before Fortescue, against the Town of Norwich, That there was a great Riot in Norwich; and one Gladman took upon him to be King, and went with a Crown of paper in a riotous manner to the Priory of Norwich, &c. and although it appears not upon the Roll Quid inde venit, yet per rot. Patent. 27 H. 6. memb. 13. their Liberties for that cause were seized, and regranted.

Tyndals Case.

3. **A** Certiorari was awarded to the Major of Hithe and the Jurats there, being one of the Cinque Ports, to remove an Endowment of Felony (viz. Buggery) against one Tyndall, supposed to be committed there: The Writ was not returned, upon pretence of a liberty or privilege belonging to the Cinque Ports, That the Kings Writ out of any his Courts shall not be awarded unto them: But ought to be directed To the Lord Warden of the Cinque Ports, who ought to make the Warrant unto them to execute it: And because the Writ was brought unto them, and no Warrant from the Warden, they would not return it: Whereupon an Alias Certiorari being awarded, and delivered to the Major and Jurats in Court, upon Oath made, that they said, they would not return it; and for that they imprisoned the messenger who brought it, in their Common Gaole; and that one Knight a Jurate spake contemptuously of the Writ

Writ being under green **Wax** (the Seal of the Court) saying, This is no time for green Plums. Upon these contempts proved by several Oaths, an Attachment was prayed against them and awarded: And now Noy the Kings Attourney being in Court said, That for this contempt he would exhibite an Information: For such contempts against the Kings messenger who brought the Kings **Writ**, are contempts against the Kings person, and such contempts ought to be severely punished; For it is termed, *Demicare contra Regem & non disceptare*: and he shewed a Record in Court, 33 Ed. 1. rot. 101. where the Bishop of Durham pretended he had such priviledges, that the Kings **Writ** ought not to run there; because one brought the Kings **Writ** thither, imprisoned him: and for this cause an Information being exhibited against him, and the offence proved, It was adjudged he should pay a fine to the King, *Et quod Capiatur*, and should lose his liberties for his time: And the entry in the Roll is, That he shall lose his liberties, Because *Justum est quod in eo quod peccat, in eo puniatur*; And he shewed another president, Trin. 21 Ed. 3. rot. 46. or 460. where in the Common-Bench a Prohibition was awarded to the Bishop of Norwich, and he excommunicated the party who brought the **Writ**, and thereupon the party brought his Action upon the Case, and declares all this matter, and he being found guilty, it was adjudged, That his Temporalities should be seised until he absolved the party, and satisfied the King for that contempt, and that the party should recover against him for damages ten thousand pounds; and upon that Judgment the Bishop brought a **Writ** of Error in the Kings Bench, and this Judgment was affirmed. And thereupon the Attourney General moved for the King, That in this Case a new **Writ** might be awarded, and they to make a return thereupon, as they shall be advised. And it was said, although in civil Pleas they have such Jurisdiction (for their Court is ancient, time whereof, &c. and confirmed by Act of Parliament) yet it cannot extend to what they do as Justices of Peace, which begun within time of memory: and that the Statute of Magna Charta cap. 9. and Articul. super Chat. cap. 7. are only, That they shall have consuetudines suas, &c. and that cannot be extended to matters of the Crown, with which they meddle as Commissioners of the Peate or Oyer and Terminer, which are all subject to the Jurisdiction of this Court.

In Mich. 8 Car. a Certiorari was prayed to be awarded to the Major and Justices of Dover, being within the Cinque Ports, to remove an Endicment of Felony against one Ringden of Dover, who was endicted there of Buggery. Henden Serjeant moved, That this should be awarded, and directed To the Lord Warden of the Cinque Ports, as other Procefs is usually directed. But upon debate all the Court agreed, That it should be immediately directed to the Justices before whom the Endicment was; For they held Pleas of it as Justices of the

the Peace by virtue of their Commissions, and not by their ancient Charters or prescription, which was awarded accordingly.

Rhemes *versus* Humphrys and his Wife.

Hill. 7 Car. rot. 1202.

4. **A**ction *sur Trover & Conversion* of Goods by Baron and Feme, ad usum ipsorum. They pleaded Not guilty, and both were found guilty, and Damages assessed, and now moved in arrest of Judgment, That the Action lies not against the Baron and Feme jointly for conversion to their uses during the Coverture: For when they join, it is the act of the Baron only, and the Feme cannot convert to her own use; but an Action of Trover well lies for conversion by the Feme before the Coverture, or by the Feme only during the Coverture; For she may do a Tort solely, and the Baron shall be sued with her, but not where she joins with the Baron; wherefore the Court would advise thereof. And afterward, Trin. 8. Car. it was adjudged for the Defendant, 38 Ed. 3. 1. 13 Ric. 2. brev. 644.

Boulton *versus* Banks. Hill. 7 Car. rot. 276.

5. **A**ction upon the Case. Whereas the Defendant kept a Bastiff, sciens that he was assuetus ad mordendum Porcos, and that the Plaintiff was possessed of a Sow great with Pigs, That that the said Bastiff bit the said Sow so as he died of the biting. After Verdict upon Not guilty pleaded, it was moved in arrest of Judgment, First, That the recital of the Bill is in placito Transgressionis, and the Declaration is in placito Transgressionis super casum, sed non allocatur. The second Exception, That to declare of a Dog ad mordendum Porcos assuetus is not good, for it is proper for a Dog to hunt Hogs out of the ground, and his biting of the Hogs is necessary, and not like to the keeping of a Dog which usually bites Sheep or other Cattel. But the Court (absente Richardson) conceived the Action well lies; for it is not lawful to keep Dogs to bite and kill Swine; Wherefore it was adjudged for the Plaintiff.

Jeffson *versus* Laxon. Trin. 7 Car. rot. 258.

6. **E**rror. Of a Judgment in Coventry. The Error assigned was, Because the Judgment being by a Nihil dicit in debt was discontinued; For the continuance was taken until the next Court, which is uncertain; for it ought to be to a day certain, as 9 Eliz. Dyer 262. But it was answered, That in Coventry there is no day certain for the keeping of their Courts; for sometimes it is held within a fortnight, sometimes within three weeks; And Jones said, all their proceedings in Wales are adjourned until the next great Sessions, and none knows when the great Sessions shall be

be held. And this Error was assigned and over-ruled in the case betwixt Bythell and Parry; And so Richardson, Jones and Whitlock, conceived it should be here: But I doubted thereof, The Judgment was affirmed.

Mounson *versus* Cloyton.

Scire facias. To have Execution upon a Judgment in Debt: The Defendant pleads, That at another time before, the Plaintiff 7. had sued a Capias ad satisfaciendum, and that the Defendant was arrested, and in Execution thereupon, and demands Judgment, &c. The Plaintiff replies, true it is, such a Writ of Capias satisfaciendum issued, and that the Defendant was arrested thereupon, and made rescous, and escaped: Therefore he sued this Scire facias to have Execution, being after the year and day. Upon this the Defendant demurred, pretending because the Plaintiff had confessed the Defendant was once in Execution, he could not afterward take a new Execution. But the Court resolved, Scire facias was well maintainable; For when he had not the benefit of his Execution, it was as none, and the Defendant shall never take advantage of his own wrong by his escape. And peradventure the Sheriff is dead; so the Plaintiff hath not any remedy against him, Whereupon it was adjudged for the Plaintiff, That he should have Execution.

Termino



Termino Trinitatis, anno octavo *Caroli* Regis,
in Banco Regis.

Butler *versus* the President of the Colledge of Physitians,
Pasc. 7 Car. rot. 319.

- I. **E**rror of a Judgment upon a Demurrer in the Common Bench. The first Error assigned was, Because the Record was Ad respondendum Domino Regi & Presidenti Collegii, &c. Qui tam pro Domino Rege, quam pro seipso sequitur quod reddat eis sexaginta libras unde idem Presidens qui tam, &c. dicit, &c. Whereas the Action ought to have been brought by the President only qui tam, &c. and not by the King and President, &c. sed non allocatur; For being an original Writ, the Writ is most often so, and sometimes the other way: And they conceived it good both ways. But Informations are always, that the party qui tam for the King quam pro seipso sequitur, &c. Vide Plowd. 77. new Book of Entries 160. old Book of Entries 143. 373. The second Error was, that the Replication was a departure from the Count; For the Count sets forth, That King Henry the eighth anno decimo Regni sui incorporavit (& per le statut of decimo quarto Henrici octavi confirmavit) the Colledge of Physitians by the name of the President, &c. that no man should practise Physick in London, or within seven miles, without Licence under the Seal of the Colledge, upon the penalty of 5 l. for every month that he so practised, the one moiety unto the King, the other unto the President of the Colledge, to the use of the said Colledge, And for that the Defendant not being allowed, &c. had practised Physick for twelve months in London. The said Action was brought, &c. The Defendant pleads the Statute of tricesimo quarto Henrici octavi, cap. 8. That every one who hath Science and experience, of the nature of Herbs, Roots, and Waters, or of the operation of the same by speculation or practice, may minister or apply in and to any outward Sore, Uncome, Wound, Aposthumations, outward Swelling, or Disease; any Herb, Oyntments, Baths, Pultes or Implaisters, according to their cunning experience and knowledge, &c. or drink for the Stone and Strangury in any part of the Realm, without suite vexation, &c. an Act or Statute to the contrary notwithstanding. And that he having skill in the nature of Herbs, Roots, and Waters by speculation and practice, applyed to persons requiring his skill, Herbs, Oyntments, Baths, Drinks, &c. to their Sores, Uncomes, Wounds, and for the Stone and Strangury or Agues, and to all other diseases

eases in the said Statute mentioned, prout ei bene licuit. Et quoad aliquam aliam practificationem seu facultatem medicinae aliter vel alio modo quod non est culpabilis. Et de hoc ponit, &c. And makes his averment, Et hoc paratus est verificare, The Plaintiff replies and shews the Statute of primo Mariae capite nono, which confirms the Charter of decimo Henrici octavi, and the Statute of decimo quarto Henrici octavi, and appoints that it shall be in force notwithstanding any Statute or Ordinance to the contrary. And upon this it was demurred, because it is a departure; for it intitles him by another Act, viz. the Statute of primo Mariae, which is not mentioned in the Count: and therefore was assigned for Error. But all the Court here conceived, That it is no departure, Because it fortifies the Count, and is as to revive the Statute of decimo quarto Henrici octavi, if it were repealed in this particular by the Statute of tricesimo quarto Henrici octavi: And for that the Case of Woodhead was shewn to the Court, Mich. 42 & 43 Eliz. rot. 397. where the President of the Colledge of All-Souls brings an Action upon the Case for taking Toll in , and shews a Charter of vicesimo sexto Henrici sexti to be discharged of Toll, The Defendant pleaded the Act of Resumption of Liberties granted by Henry the sixth, made , and so the Liberty gone. The Plaintiff pleaded a reviver of them by the Statute of quarto Henrici septimi: And it was held to be no departure, But as it were a confession and avoiding. The third and principal Error assigned was, if the Statute of tricesimo quarto Henrici octavi, be not repealed by the Statute of primo Mariae, and if not, Whether the Defendant hath made a sufficient justification? And Quoad that, Whether the said Statute be repealed, the Court was not resolved, But Richardson chief Justice conceived it was repealed by primo Mariae, by the general words, any Act or Statute to the contrary, of the Act of decimo quarto Henrici octavi, notwithstanding. But I conceived, that the Act of tricesimo quarto Henrici octavi, not mentioning the Statute of decimo quarto Henrici octavi, was for Physicians; but the part of the Act of tricesimo quarto Henrici octavi, was concerning Chirurgions and their applying outward Medicines to outward Sores and Diseases: And Drinks only for the Stone, Strangullion and Ague; That Statute was never intended to be taken away by the Act of primo Mariae. But to this point Jones and Whitlock, would not deliver their opinions. But admitting the Statute of tricesimo quarto Henrici octavi, be in force, yet they all resolved, the Defendants Plea was naught, and not warranted by the Statute; for he pleads, That he applied and ministred Medicines, Plaisters, Drinks, Ulceribus, Morbis, & Maladiis, Calculo, Strangurio, Febribus, & aliis in Statuto mentionatis; So he leaves out the principal word in the Statute (Externis.) And doth not referre and shew, That he ministred potions for the Stone, Strangullion or Ague, as the Statute appoints to these three diseases only, and to no other. And by his Plea his

potions may be ministred to any other sickness; wherefore they all held his Plea was nought for this cause, and that Judgment was well given against him; Whereupon Judgment was affirmed.

Walker *versus* Sir John Lamb. Trin. 7 Car. rot. 374.

2. **A**ction upon the Case. For disturbance of the Plaintiff in exercising his Offices of the Officialty of the Archdeaconry of Leicester, granted by the Archdeacon of Leicester, and of the Office of Commissary of the Bishop of Lincoln. Upon Not guilty pleaded a special Verdict was found, That these were ancient Offices, the one granted by the Archdeacon of Leicester, the other by the Bishop of Lincoln, and were Offices of Judicature always granted to one person for life until 1609. and in anno tricesimo Elizabethæ, were so granted to Doctor Chippendale, and after, in 1609. those Offices were granted to Doctor Chippendale and to one Edward Clerk for their two lives, no surrender being actually made by Doctor Chippendale; afterward, 1614. both Offices were granted, the one by the Arch-Deacon, the other by the Bishop to Sir John Lamb and to the said Edward Clerk; and those Grants confirmed by the Dean and Chapter, That in anno 1622. Doctor Chippendale died, and afterwards the Arch-Deacon who granted that Office, and the Bishop who granted the Office of Commissary died, and the Bishop of Lincoln who now is, and the now Arch-Deacon by several Patents granted those Offices to the Plaintiff, who was at the time of the Grant of the Patent a Lay person, and Bachelor of the Civil Law only: And they find the Statute of tricesimo septimo Henrici octavi, capite decimo septimo, That Lay persons married or unmarried, being Doctors of the Civil Law, may be Commissaries, Officials, Scribes or Registers, and that the Plaintiff exercised those Offices, and the Defendant disturbed him, Et si super, &c. Upon this, the matter being argued at the Barre, was reduced only to two questions; First, Whether the Patent to the Plaintiff, being a Lay person and not a Doctor of the Law, were good, or restrained by the Statute of tricesimo septimo Henrici octavi? And as to that point, all the Court conceived, The Grant was good; for the Statute doth not restrain any such Grant: And it is but an affirmance of the Common Law, where it was doubted if a lay or married person might have such Offices; and to avoid such doubts, this Statute was made, which explains, That such Grants were good enough; and it is but an affirmative Statute, and there is no restriction therein: And although the Statute saith, that Doctors of the Law, (though Lay persons or married) shall have such Offices, yet that is not any restriction, That none others should have them but Doctors of the Law; and the Statute mentions as well Registers and Scribes as Commissaries, and that a Doctor of the Law shall have them; yet in common experience such persons as are merely Lay and not Doctors have

have had such Offices : And upon this very point was a Case in this Court, Hill. 35 Eliz. rot. 181. between Pratt and Stock, where, upon demurrer, this Statute was pleaded against the Plaintiff to whom the Commissaryship was granted, being but a Bachelor of Law, and he having granted administration, the Grant was adjudged good, and the Book of Entries, 484 and 489. was allowed good; wherefore they resolved the Grant was well enough. And it was also resolved, That where an Officer for life accepts of another Grant of the same Office to him and to another, it is not any surrender of the first Grant. The second point was, Whether the Office of the Officialty of the Archdeaconry, and the Office of the Commissary of the Bishop, be grantable by the Statutes of primo Elizabethæ, & decimo tertio Elizabethæ, because it was pretended, they were not parcel of the possessions of the Bishoprick or Archdeaconry, so as they could have any profits by them, and then the Statute doth not restrain the Grants of them: But all the Court resolved, they were within the words and intent of the Statutes; for they be Hereditaments, and are pertaining unto them; And that a Grant of those Offices to two, where they were only grantable to one for life, and being granted in reversion, is a void Grant by the Statutes against the Successors; for the Statutes restrain all Grants of any thing to be avoidable against the Successor, besides Grants of necessity, and Leases for three lives or one and twenty years, where the ancient Rent is reserved: And all other Grants, as well of Offices as of other things, not warranted by the Statutes, are made void as against the Successors. Vid. Coke 10. fol. 60. the Bishop of Salisburys Case, Cok. 5. fol. 14. and a Case between Vaughan and Crompton 14 Jac. at the Assizes before the Justices of Assize for the Office of the Register-ship in Suff. and between Johns and Powell for the Registers place of Hereford, where it was adjudged, that such Offices granted in Reversion were void: Whereupon Rule was given, That Judgment should be entered for the Plaintiff, unless other cause were shewn. And afterward being moved again, Judgment was given for the Plaintiff.

Tredymmock versus Perryman. Mich. 7 Car. rot. 76.

ERror of a Judgment in Cornwall, in Debt upon an Obligation. The Error assigned was, because the Tryal of the Issue joyned there, was by six Jurates only. Rolls for the Defendant moved, That it is not Error; for it is returned, That he tried it there by six secundum consuetudinem ibidem à tempore, &c. before used: And the Court being by prescription, the Tryal then by the custome may be by six; and there be multitude of Records in twenty several Courts in Cornwall, where Tryals may be by six, by customs there used; wherefore, if it should be reversed, many others should be reversed. But all the Court held, That such a custome

is void, and against the Common Law, and there cannot be an exemption of persons from being Jurors, unless there be sufficient Jurors besides the persons exempted to make tryals: And Jones said, although in some parts of Wales there be such Tryals by six only, it is by reason of an Act of Parliament of tricesimo quarto Henrici octavi, which appoints, That such Tryals may be by six only, where the custome hath been so, which proves that when they were united to England, and to be governed by the Laws here, such Tryals could not be, unless they had been so provided for by Parliament; Whereupon the Judgment was here reversed.

Major *versus* Brandwood. Hill. 5 Car. rot. 643.

4. **R**Eplevin. Of an Ore taken, &c. The Defendant makes conscience as Bailiff of John Brandwood, for that he was seised in fee of the Mannor of D. and that one Smith was seised in fee of such a Tenement holden of the said Mannor by Rent and Hariot service, payable after the death of the Tenant; and that Smith died possessed de Animalibus & Cattallis; And because the Hariot was not paid, he by the command of the said John Brandwood distrained, and so made Conscience; and the Issue was upon the Tenure, and found for the Defendant: And now Exception was taken in arrest of Judgment, Because he doth not shew what was the best beast, which he demanded, nor the kind thereof, nor the price of it: For this cause Hyde moved, That the Abowry was ill, for it is uncertain what thing the Defendant should have, or how he shall be satisfied if he should have Return. And he said, all the precedents are in point, That he ought to shew what the Hariot is, when he demands the price thereof. Vid. Coke 8. fol. 103. Talbotts Case, Plo. 94. eid. the Book of Entries 584. But Hutchinson said, when the Lord distrains, it is because the Hariot is eloigned, and therefore he cannot seise it; so then he cannot shew what is the best beast. And for an Hariot service it is at the Lords election either to distrain, or to seise it, if he can find it; yet seise he cannot, unless the proper beast of the Tenant only; but he may distrain any mans beasts, which are upon the land, and retain them until the Hariot be satisfied. And he said there were divers precedents in the Common Bench, where he avowes without shewing what was the best beast, or any price thereof: And it would be inconvenient to enforce the Abowant to shew it, for peradventure he doth not know, or ever saw it. Vid. 24 Ed. 3. 72. 44 Ed. 3. 13. And afterwards it was adjudged for the Abowant.

This Case was moved again, Mich. 8 Car. by Germin, That the Avowry was not well made, Because it doth not appear what beast he should have for the Hariot, nor of what value, the Return being irreplevisable: Nor can the Plaintiff know what to offer, to have again his Cattel. But all the four Justices present, agreed, That the

the Avowry is good enough; for peradventure the Avowant doth not know what was the best best, and the Plaintiff having done wrong by his eloignement, be at his peril ought to tender sufficient recompence: And that the Avowry was good, there were shewn two presidents, the one Trin. 18 Eliz. rot. 506. betwixt Dicker and Higgons: the other Trin. 13 Jac. rot. 1148.

Hix *versus* Hollingshed. Hill. 7 Car. rot. 765.

ERror of a Judgment in the Common Bench, in an Action upon the Case for words. She is a Bawd and hath bewitched him by Witchcraft and Sorcery. Germin for the Plaintiff in the Writ of Error moved, That these words be not Actionable; for to call one Bawd no Action lies at the Common Law: But to say that she keeps a house of Bawdry is Actionable at the Common Law, And that the Judgment passed sub silentio in the Common Bench. But it was held, by Jones and my self, That the Action well lies for the last words, And hath bewitched him, &c. But for the first words 'twas doubted; Wherefore, *ceteris absentibus*, a rule was given, that Judgment should be affirmed. 5.

Mead *versus* Perkins.

ERror of a Judgment in the Common Bench, in an Action for words: Where the Plaintiff Perkins declared, That he was an Attorney of the Common Bench, and of the Sheriffs Court in London: And that the Defendant spake these scandalous words of the Plaintiff, He (*presatum le Plaintiff innuendo*) is a coufener, and coufens his Clients in the Sheriffs Court of London, and was for that cause discharged of that Court. The Defendant pleaded Not guilty, and found against him, and Judgment: And the Error assigned; That the words be not actionable. But the Court held they were scandalous, and touched him in his profession; and Judgment was affirmed. 6.

Ellis *versus* Johnson. Trin. 7 Car. rot. 1039.

ERror of a Judgment in D. an inferiour Court. The Error assigned, Because after an Habeas Corpus cum causa, was sued out of this Court and delibered to the Major and principal Officer of that Court, and acceptance and allowance thereof, they notwithstanding proceeded to Tryal and Judgment. The Defendant pleaded in nullo est erratum. And now Germin moved, That this is not error, because he doth not alledge the Habeas Corpus to be upon Record; so as the error now assigned is not tryable. But it was held, That that proceeding after the Habeas Corpus delibered is 7.

is an Error, and coram non Judice, which is confessed by the pleading in nullo est erratum : And if it were not true that it was delivered to the Jazoz and allowed, it ought to have been denyed, and is tryable *per pais* ; but because it is not denyed, it is a manifest error ; Whereupon the Judgment was reversed.

Wilson versus Chambers.

8. **E**rror of a Judgment in the Common Bench. Upon *Trover & Conversion* of a Bond of 100 l. conditioned for the payment of 50 l. at such a day, which came to the Defendants hands, and he being required such a day and year to deliver it, had not delivered it ; but refused and converted it to his own use (but no day, year or place, of this Conversion mentioned.) The Defendant pleaded Not guilty, and found against him, and Judgment for the Plaintiff. The first Error assigned by Master Grimston was, Because no date of the Bond is mentioned, sed non allocatur ; for being lost and converted, he peradventure did not know the certain date of the Bond, and if he should recite a date and miscite it, it would be a Fayler of his Suit. The second Error, Because he did not alledge the day nor place of the Conversion, sed non allocatur ; For the denying to deliver it upon request is a Conversion, and the day, year, and place are thereby alledged, which is sufficient ; Whereupon the Judgment was affirmed.

Kiffin versus Vaughan and his Wife, Trin. 6 Car. rot. 571.

9. **E**rror of a Judgment at the grand Sessions in the County of *Montgomery* in a Quod ei de forceat, in nature of a Writ of Right. The Defendant saith, That he hath majus jus than the Plaintiff, and Issue thereupon ; and at the day the Defendant made default, and petit Cape awarded, and at the day of the petit Cape returned Edward ap Thomas prayed to be received ; because the feoffment was made to the use of the said Vaughan and his wife, for the life of the wife. The remainder to the said Edward ap Thomas and his heirs. The Demondant counterpleads that Receipt, Traversing the feoffment, and Issue joyned thereupon, and at the day of return of the Jury, Edward ap Thomas did not appear, but one John ap Edwards as his Son and heir, prayed to be received by his Guardian, he being within age, and said, that his father was dead, and he as Son and heir appeared, and pleaded the same Plea, as his father pleaded, and prays *q le paroll demurrer pur son nonage*, The Plaintiff counterpleads his receipt, taking Issue upon the feoffment ut antea, and upon that, they were at Issue and at the day, the Tenant by receipt made default, and a petit cape awarded, and at the day he did not save his default ; Whereupon Judgment was against the Tenant by receipt, and Error brought. The first Error assigned was, Because the Counterplea was of the feoffment alledged, where he

he ought to have said of the Reversion, and he cannot Traverse the feoffment; But quocunque modo the Reversion. And although he hath it not by feoffment, yet if he hath it by any other way, that sufficeth. The second Error was, Because the receipt is admitted, after receipt, which ought not to be, unless in case where the Tenant by receipt dyes, and his Heir comes in loco suo. The third Error was, Because the Judgment was given upon the default of the Tenant by receipt, against the Tenant by receipt, where the Judgment ought to be always, against the Tenant to the Action, and this was held a manifest Error; Whereupon the Judgment was reversed.

Abraham Jennings Plaintiff *versus* Vandeputt and others.

DEbt upon an Arbitriment to deliver 75 l: And declares that 10.
the Plaintiff and Defendants submitted themselves to the Arbitriment of four Merchants, concerning certain Accounts of Pilchers; so as the Arbitriment be made and delibered in writing, before the twentieth of July following: And if they could not agree, then to the Arbitriment of such an Empire as the Arbitrators should name; so as he made his Empire in writing before the five and twentieth of July following. And shews that the four Arbitrators did not make any Arbitriment, ad vel ante the twentieth of July following; but that before the twentieth of July, viz. the eighteenth of July, three of them, and the fourth Arbitrator agreeing thereunto upon the one and twentieth of July, by their writing dated the eighteenth of July, nominated Abraham Chamberlaine for Empire, who took the charge upon him, and before the twenty fifth of July made an award super premissis, viz. That the Defendants should pay the said 75 l. within a month, &c. And for non-payment, this Action was brought: And upon nil debet, found for the Plaintiff, and after Verdict moved by Grimston in arrest of Judgment, That this nomination of the Empire before the twentieth of July, (at which time they were to make their award) was not good. For they had all that time to make their award, and no time then appointed for to nominate an Empire, until after the twentieth of July. sed non allocatur; For there is no compleat nomination until the agreement of the fourth Arbitrator with the other three, viz. the one and twentieth of July, and the writing is not to have effect until that time. And it is no writing by intendment until sealed, although it be dated before. And if they had nominated the Empire before the time expired of making their Arbitriment, yet it is good enough, when no Arbitriment is made by them within the time; Whereupon it was adjudged for the Plaintiff.

Watts *versus* Baker.

11. **T**respas quare clausum fregit. The Defendant pleads according to the Statute of vicesimo primo Jacobi, that he tendered amends before the Action brought, viz. the second of October septimo Caroli. The Plaintiff replies, That before such tender, he sued a Latitat, Teste the last day of Trinity Term before, and upon that procured the Defendant to be arrested, intending to declare in Trespass; It was thereupon demurred, and resolved, That this Tender came too late: For as well as a Tender after an original Writ, comes too late; so after an Arrest upon a Latitat: For the Tender by the Statute is intended to be immediately after the Trespass, and before any Suit commenced; Wherefore it was adjudged for the Plaintiff.

12. **A** Prohibition was prayed by Calthorp. To stay a Suit upon an Appeal here to the Delegates from a sentence in Ireland; For Tythes of Fish taken in the Sea. Because fish in the Sea or great Rivers are *feræ naturæ*, and not Tythable. Secondly, Because the Sea is not within any Parish: So as no spiritual Person can say it is within his Parish, where the fish is taken. But the Prohibition was denied; For Tythes of fishes are usually paid in Ireland, as Jones affirmed. And it was said in Cornwall, they pay Tythes for fishing in the Sea, to the Parson of the Parish where they are landed: And it is a custome in Yarmouth, that Tythes shall be paid for Herrings.

Hopestill Tyldens Case. Ante pag. 252.

13. **A** Cerciorari being awarded, to the Major and Jurates of Hithe, to remove an Endiament taken there against Hopestill Tilden, who was Endited before them for Buggery: They returned upon the Writ, That it is one of the Cinque Ports: And that they have a priviledge there, and of time whereof, &c. That no Writ out of the Kings Courts runs there; But it must be directed to the Warden of the five Ports who should send them, and then they were returned, and not otherwise. And it was moved, That this is an ill return, and that they had not any such liberty; For they may not meddle with matters of the Crown, because it is saved in Magna Charta; Whereupon it was prayed, That it might be disallowed, and that a Pluries Cerciorari might be awarded against them, commanding them to certify the Endiament at such a day, and then to be in person to shew their Charters and evidence

evidence for their pretended claims, and to answer their contempt, in not returning the Record upon the first Writ: And Noy the Kings Atturney shewed a Record, Pasch. 43 Ed. 3. rot. 19. out of the Treasury of the Exchequer. A Writ being awarded out of the Chancery, To the Mayor and Commonalty of London, to certifye an Endiement there taken against one Lombard for ingrossing of Silk, upon the Alias they made such return, That by ancient Charters confirmed by Parliament and ancient usage, they had such a privilege, That all Endiements and proceedings for any cause unless for Felony, should be tryed and determined there, and not elsewhere: And hereupon a Pluries was awarded to return this Endiement into Chancery, and that they should be there at the same day to shew their evidence and Charters to maintain their claim, and to answer their contempt: And at the same day they returned all their evidence and proceedings there. And so it was prayed, That such course should be observed here: And the Court awarded accordingly a Pluries Cerciorari directed to the Mayor and Jurats.

Goodyear *versus* Bishop.

Action for words. Whereas the Plaintiff is, and for divers years hath been a Merchant, and used the Trade of a Merchant, That the Defendant having communication with one Harris of the Plaintiff, to scandalize him, and deprive him of his means of living, said of the Plaintiff these scandalous words, He (innuendo the Plaintiff) is not worth a groat, he is 100 l. worse than nought. After Verdict for the Plaintiff in London, and one hundred marks damages given, It was moved in arrest of Judgment, that these words be not actionable; For he doth not shew, that he spake of him as in relation to his profession, nor called him Bankrupt. But all the Court held, That these words of a Merchant who lives upon his credit, which is the principal means of his gains, be very scandalous, and tant amount as if he had called him Bankrupt: Wherefore it was adjudged for the Plaintiff.

Johnson *versus* Sir Henry Rowe.

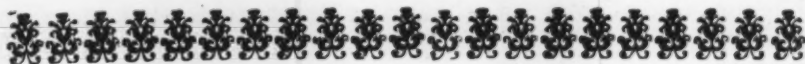
Prohibition. For that the Prior of the Salutation of the order of the Carthusians was seised in fee of an House and Grange, called Bloomsbury in the Parish of Saint Giles, and of such Lands in the Tenure of the Plaintiff: And that he and all his predecessors, until the day of the dissolution held them discharged of Tythes. And, so seised, vicesimo nono Henrici octavi, surrendered them to the King,

and pleads the Statute of tricesimo primo Henrici octavi, and conveys the interest from the King to the Plaintiff, &c. The Defendant pleads, That primo Maii 1422. it was agreed betwixt the Master of the Hospital of Burton Lazars and the said Prior, That when the Lands of the Manor of Bloomsbury were in the hands of the Tenants or Farmers of the Prior, that Tythes should be paid: And when the Lands should be in the hands of the Prior himself, that they should not pay Tythes; but then they should have six Kine-gate, in such a Pasture of, &c. in lieu of the Tythes, And conveys the possession of the Hospital to the King by surrender, and from the King to the Defendant, and Traverseth, That the Plaintiff now holds the Lands discharged of Tythes, &c. whereupon the Plaintiff demurres, and it was adjudged for him, That the Plea is ill, and no good inducement to the Travers; for he makes no Title to the Master of the Hospital to Tythes, but only pretends an agreement, but doth not intitle him to the Tythes, nor shews that he was seised of them in fee, nor doth shew any thing for which they might make such an agreement; also he doth not shew the agreement to be by writing, and the inducement of a Travers ought to be always sufficient; Whereupon it was adjudged for the Plaintiff.

The King *versus* Warde and Lyme.

16. **I**Nformation. Whereas there was from the time whereof, &c. a common high-way in Cold-Ashby, in a Lane called Crick-lane, leading to divers Market-Towns, as well for Horse-men as for Foot-men, and for Carriages, That the Defendant, the first of June, septimo Caroli, with hedges and ditches erected cross the Lane, inclosed and stopped the said way, and held it inclosed and stopped, whereby, &c. The Defendants confess that there was such a common high-way prout in the Information, and that they inclosed and stopped it. But they said that the said way was so foul, and surrounded with water and dirt, That Passengers could not pass there without great danger. And that before the stopping of the Lane, viz. the thirtieth of May, septimo Caroli, for the profit and ease of the Passengers, one Carew Sands, being seised in fee of a Close adjoining to the said Lane, laid out another way more commodious for the Kings people there to pass, and before the laying out of that way, viz. decimo octavo Maii septimo Caroli, a Writ of ad quod Damnum issued to enquire, whether it were to the damage, &c. if the King should grant such licence to the Defendants to stop the said way? And thereupon an Enquisition was taken tricesimo primo Maii, septimo Caroli, That it was not to the damage, &c. if the King should grant such licence, &c. For that another way is laid out as beneficial for the people, absque hoc, That

That they inclosed and stopped it with hedges, &c. ad commune nocumentum, &c. Upon this the Kings Atturney demurred. And now it was moved, That this Plea was ill in matter and form, because the allegation that Carew Sands laid out another way moze beneficial for the Kings people, not appearing by what authority he did it, is not good; for it is but at his pleasure, and he may stop it when he will; and by that laying out, the Subjects have not such interest therein, so as they may justifie their going there; nor is it any such way, that the Inhabitants are bound to watch there, or to make amends if any robbery be there committed, nor is any person lyable to repair and maintain it; also the pleading the issuing of the ad quod Damnum, and the Enquisition thereupon, is to no purpose, when he doth not plead, that he obtained licence; for that is only on purpose to enable him to obtain licence, and therefore the Plea is ill. Vid. Register 253. & 255. Another exception was taken, Because the Travers is ill, That he did not inclose ad nocumentum, &c. Wherefore and for these reasons the Court held the Plea ill, and gave rule for Judgment.



Termino Michaelis, anno octavo *Caroli* Regis,
in Banco Regis.

1. **M**emorandum. In the Vacation Sir *James Whitlock*, one of the Justices of the Kings Bench, died in his house at *Fauly* in the County of *Bucks*, and Sir *Francis Harvey*, one of the Justices of the Common-Bench, died at his house in *Northampton*, and Sir *Robert Berkley*, the Kings Serjeant of the Middle-Temple, was made and sworn Justice of the Kings Bench the eighteenth of October, and *Francis Crawley*, the Queens Serjeant, was made and sworn Justice of the Common-Bench the same day.

Halley versus Stanton. Trin. 8 Car. rot. 1405.

2. **A**ction for words. Whereas he had been always of good conversation, and never touched with any suspicion of any matter of felony, and used the Trade of buying and selling of Cattel, and thereby gained his living; That the Defendant maliciously spake these words of the Plaintiff, He, (*innuendo* the Plaintiff) was arraigned at *Warwick* for stealing of twelve Hogs, and if he had not made good friends, it had gone hard with him; *ubi revera* he never was arraigned nor questioned for any felony. After Verdict upon Not guilty pleaded, it was found for the Plaintiff, and damages twenty pounds; And now Serjeant Crew moved in arrest of Judgment, That these words be not actionable; For to say, He was arraigned for felony, is not any cause of Action, no more than to say, That one was detected for felony: For good and honest men may be suspected or arraigned for felony: and in *tricesimo primo Elizabethæ*, it was resolved in the Case of *Noell* an Attorney, You were cooped up for forging of Writs; adjudged the Action lies not; so here, &c. wherefore, &c. But all the Court seriatim delibered their opinions, That the Action lies, especially as in this case it is alledged, That he falsely and maliciously spake these words, adding, If he had not made good friends, it had gone hard with him, which shews, That he conceived he was guilty of such an offence; and when it is merely false, as it appears by averment, That he never was arraigned for any felony, nor ever committed any, it is the more malicious; and being spoken in disgrace, that none should trust him, it therefore differs from the Case cited, and from the Case *Patch. 34 Eliz. betwixt Bayly and Charrington*, in the Common-Bench, where an Action was brought for saying these words, Thou wert arraigned for two Bullocks: After Verdict, upon Not guilty found for the Plaintiff, it was adjudged that the Action lies not,

not, Because he doth not say, For stealing of Bullocks, nor that any felony was committed. nor aberses that he never was arraigned for felony, as here. Also a Case was cited, Trin. 8 Jac. in the Kings Bench, betwixt Hayns and Spratt, for saying, Thou wert in Norwich Gaol for a Robbery committed upon J. S. with an Aberrment, That he never was in any Gaol for felony, it was adjudged, That the Action lay; Whereupon it was here adjudged for the Plaintiff.

Southold *versus* Daunston. Trin. 8 Car. rot. 368.

Action upon the Case for words. Whereas he was of good name and fame, and was in Communication to be married to such a woman, with whom he should have had such a Portion; That the Defendant to scandalize him, and to hinder and deprive him of his Marriage, spake these words of the Plaintiff, Southold hath been in bed with Dorchester his Wife, whereby he lost his Marriage. After Verdict upon Not guilty pleaded, and found for the Plaintiff Bing Serjeant moved, That these words be not actionable; for it may be, he was in bed with her when he was a Child, she being his Nurse, or it may be that her husband was in bed betwixt them: And words shall be taken in mitiori sensu when any construction can be made to help it. But Jones and my self conceived, that being spoken to disgrace him and deprive him of his Marriage, and he shewing that he was deprived of his Marriage, he hath good cause of Action, and such foreign intendments as hath been alledged shall not be taken, but it shall be adjudged *ex affectu dicendi*, which is here to hinder him of his Marriage; as it is now found by the Verdict: But they would advise thereof. *Residuum postea*, adjudged for the Plaintiff.

Favely *versus* Easton. Hill 6 Car. rot. 1075.

Ejectione firmæ. Of a Messuage and two hundred acres of Land, fifty acres of Meadow, and twenty acres of Wood in Bishops Morchard. Upon Not guilty pleaded, and a special Verdict, it appeared, That John Easton Tenant in tail to him and the Heirs Males of his body, of this Messuage and Land called Eastons, lying in Bishops Morchard, levied a Fine thereof by the name of a Messuage and two hundred acres of Land, fifty acres, &c. in Essington, Easton, and Chilford, to the use of him and his Heirs; And they find, That there is not any Till, or Hamlet, or place known by the name of the Messuage or Tenement called Eastons, out of the Tills or Hamlets, and that none of the said Tenements either be or were in Essington or in Chilford; And whether upon this matter found, a Fine levied of Lands in places known in a Till, not mentioning the Till or Hamlet where the Lands are, be good, was the sole question: And it was argued by Grimston, That it is not good;

for a Fine ought to be of Lands in a Will or Hamlet, naming the Will or Hamlet wherein they lie, or the places known out of every Will or Hamlet, but not of Land in places known within a Will, as here, a place known without mentioning the Will. But Calthorp for the Plaintiff argued, That the Fine is good, Because it is a personal Action; and although the Covenant be real in respect it concerns Land, yet the Action is personal; and as personal Actions may be brought of Land in places known: by the same reason Fines may be levied. Vid. 1 Hen. 5. 9. per Hales, 21 Ed. 3. 14. 38 Ed. 3. 20. 29 Ed. 3. 10. 7 Ed. 6. Fines Brook 9. 44. For a second reason, A Fine is but an assurance by agreement betwixt the parties, which may be by such names as the parties agree; and he cited for that a Case in this Court, Pasch. 17 Jac. rot. 140. betwixt Munck and Butler. And of this opinion was Richardson and Jones, and my self agreed with them; For, a Fine being but an assurance, is favourably to be taken, as a recovery of an Abbotson or Pension, though it be not proper, yet being suffered, hath been adjudged good, because it is but a common assurance, although not allowable in other Actions, as Coke lib. 5. fol. 40. Dormers Case is resolved: So this Fine being levied and recorded is good enough: But the Court would advise further thereof, postea pag. 276.

Cawdry versus Highley, aliàs Tythay.

5. **A**ction for words. Whereas the Plaintiff was of good conversation, and exercised in the practice of Physick, as well in London as in the County of Lincoln and other places, and by reason of his knowledge in the said Art, was, about twenty years since, made Doctor of Physick in Cambridge according to the course of the University, and practised, and ministred Physick to divers Noble-men and others for 21 years last past: That the Defendant (premissorum non ignarus out of malice, to scandalize him with his Patients, and to withdraw them from meddling with him) said of the Plaintiff, and to the Plaintiff, in the presence and hearing of divers, Thou art a Drunken Fool and an Ass; Thou wert never Scholar, and art not worthy to speak to a Scholar; and that I will prove and justifie. After Not guilty pleaded, and found for the Plaintiff, it was moved by Hotton, that the Action lies not; for he doth not shew there was communication with any concerning his skill in Physick, or his practice therein: And the first words, Thou art a Fool and an Ass, be but words of scorn; And the other words touch him only in Scholarship and not in his Art: And a Physician may be no good Scholar, and yet a good Physician: And it was compared unto Buckleys Case, for saying of an Atturney, That he is a corrupt man; unless there be conference of his Profession, the Action lies not. Richardson said he was of that opinion; but we would advise: Afterward, Trin. 9 Car. it was adjudged for the Plaintiff.

Manning

Manning and his Wife *versus* Fisherbert.

Action upon the Case. For that the Defendant ex malitia upon 6.
the Plaintiffs Wife crimen felonix imposuit, and had caused
her to be brought before Mr. Gregory, a Justice of Peace of the
County of Oxon, & falsè & malitiosè laid before him ad tunc & ibi-
dem, That he charged her with felony, for stealing of an Hog from one
Hundby his Cosen, and required, That she might be bound over to
the Assises; whereupon she was inforced to find Sureties for her
appearance at the Assises. After Verdict, upon Not guilty pleaded,
and found for the Plaintiff, and forty Hillings damages asselt,
Littleton Recorder of London moved in arrest of Judgment, That
the Action lies not: First, Because they do not say, That the De-
fendant falsè imposed upon her the crime of Felony. Secondly,
for that they do not shew the day and the place, when and whither
he caused her to be brought. Thirdly, Because they joyn Actions
for words, and in nature of a conspiracy together; sed non allocan-
tur. For when they say that the Defendant, ex malitia, imposed
crimen felonix, that implies falsè; and when it is said, he caused
her to be brought before a Justice of the Peace, that is coupled with
the other, and shall be intended the same time and place, especially
when it is afterwards, That he ad tunc & ibidem charged her with
Felony: And for the other matter, it is not in nature of a conspiracy,
but an aggravation of the false and malicious accusation; Where-
upon it was adjudged for the Plaintiffs.

Chapman *versus* Allen. Hill. 7 Car. rot. 419.

Action *sur Trover* of five Kine. Upon Not guilty pleaded a 7.
special Verdict was found, That one Belgrave was posses-
sed of those five Kine, and put them to pasturage with the Defen-
dant, and agreed to pay unto him twelve pence for every Cow
weekly, as long as they remained with him at pasture, and that
afterwards Belgrave sold them to the Plaintiff, and he required
them of the Defendant, who refused to deliver them to the Plain-
tiff, unless he would pay for the pasturage of them for the time that
they had bin with him, which amounted to ten pounds: Af-
terwards one Foster paying him the said ten pounds, by the ap-
pointment of Belgrave, he delivered the five Beasts unto Foster; and
if super totam materiam he be guilty, they find for the Plaintiff,
and damages twenty five pounds; and if, &c. then for the Defen-
dant. Jones and my self (absentibus ceteris Justiciariis) concei-
ved, That this denial upon demand, and delivery of them to Fo-
ster, was a conversion, and that he may not detain the Cattel a-
gainst him who bought them, until the ten pounds be paid, but is
inforced to have his Action against him who put them to pasturage:
And it is not like to the Cases of an Inn-keeper or Taylor: They
may

may retain the Horse or Garment delivered them until they be satisfied; but not, when one receiveth Horses or Kine or other Cattel to pasturage, paying for them a weekly summe, unless there be such an agreement betwixt them; Whereupon Rule was given, That Judgment should be entred for the Plaintiff.

Johns versus Staynar. Hill. 8 Car. rot. 243.

8. **E**rror of a Judgment in Ejectione firmæ. The Error assigned, Because the original Writ doth not warrant the Declaration; for the original bears date vicesimo quarto Januarii sexto Caroli, and the Ejectment is supposed tricesimo primo Januarii. And after Verdict, upon Not guilty pleaded and found for the Plaintiff, and Judgment entred, this Error was assigned; and upon Diminution alledged, the Writ was certified; and the Defendant pleaded In nullo est Erratum. And now Rolls moved, That it is good notwithstanding; for the Writ was retournable crastino Purificationis, and the Cryal was upon the Issue joyned Trin. septimo Caroli; and there doth not appear any continuance upon this; Wherefore it shall be intended, That another original Writ was brought, which is wanting, and not certified: And compared it to the Case of the Bishop of Worcester, where the Declaration was of a Lease by himself in an Ejectione firmæ, and the Writ certified was of a Lease by his Predecessor, and holden, That it should not be intended the Original; whereupon the Action was brought. Also where an Action is brought and tryed in Midd. and the original certified in London, it shall be intended not to be the same Original, but rather, That it was a Verdict without an Original, which is aided by the Statute, where there is no Original. Vid. postea 281.

Harris versus Richards. Trin. 7 Car.

9. **A** Sumpsit. Whereas one Bond was bound to the Plaintiff in an Obligation of forty pounds, for the payment of twenty pounds; and whereas the Defendant was bound to one Hodges in an Obligation of one hundred pounds, dated quinto Februarii decimo nono Jacobi, for the payment of fifty five pounds the fifth of February following, and the said twenty pounds and fifty five pounds being due and not paid, That the Defendant, the first of February 1624. which was, in anno vicesimo secundo Jacobi, in consideration the Plaintiff would forbear the payment of the twenty pounds until 1627. and in consideration the Plaintiff would compound with the said Hodges for the said fifty pounds, and the interest then due, and deliver the said Bonds into his hands, assumed to pay unto him the said twenty pounds and the said fifty pounds, and all the interest, which he should pay or compound for; and alledges in fact, That he did forbear the said twenty pounds: And upon the first of March 1624. paid the said fifty pounds

pounds, and fifteen pounds for interest, and obtained the said Bond into his hands; And that upon such a day, year, and place, he gave notice thereof to the Defendant, and required of him payment thereof according to his promise, who had not paid it, and therefore he brought this Action. After Verdict for the Plaintiff Germin and Calthorp moved in arrest of Judgment, That this Action lies not; for it is no lawful consideration to pay interest; sed non allocatur: for it is to compound a forfeited Bond, which is a good consideration: Also it is no unlawful consideration to pay interest, not being more than is permitted. The second Exception was, That there was not any consideration why the Defendant should pay the twenty pounds; for he had not any benefit thereby, sed non allocatur: For it is a sufficient consideration, That the Plaintiff at his request would forbear it. The third Exception, That it is not alleged he gave notice what he paid for the composition, nor the place nor time, sed non allocatur: For upon the view of the Record it appeared, That the said day and place of the notice were set down: And Jones conceived, If there had not been such precise notice of the quantity he paid, and when; yet being expressly alleged that he paid so much, and required it, and that it was not paid upon request, it had been sufficient; Wherefore it was adjudged for the Plaintiff; and Error being afterward brought, the Judgment was affirmed.

Burgoyne *versus* Spurling. Trin. 7 Car. rot. 373:

Ejectione firmæ. Upon a special Verdict the Case was. Thoma^{10.} Jackson a Copyholder, vicesimo Aprilis 6 Car. Reg. surrendered a Copyhold Messuage, and twenty acres of Land, parcel of the Manor of Hurst, into the hands of two Tenants of the Manor to the use of Hutchinson and his Heirs, upon condition, That if he paid the said Hutchinson 1060 l. upon the first of July following, That the surrender should be void. And they find the custom of the Manor, That a Copyholder may surrender his Copyhold into the hands of two Tenants of the Manor, and that the twenty fifth of May, sexto Caroli, before the payment of the said money, he surrendered an acre, parcel of the twenty acres, into the hands of two Tenants of the Manor, to the use of William Jackson and his Heirs, and afterwards the Surrenderoz paid the said 1060 l. according to the condition, and then surrendered the said Tenements into the hands of the Steward of the Manor, to the use of Richard Price and his Heirs, and afterwards the eighth of October, sexto Caroli, being the first Court after these surrenders made, the two last surrenders were presented, and the said William Jackson was admitted to the said one acre surrendered to the use of him; and the said Richard Price was admitted at the same Court to the said Messuage and twenty Acres, whereof the said one Acre was parcel, according to the surrender made to the use of him; And that the said

In

Surrender

surrender to the use of Hutchinson was never presented; and that there is a Custom within the Manor, That if any surrender be made out of Court to the use of another, and be not presented at the next Court, it is merely void; and that the said Richard Price entered into the said one Acre, and made a Lease to the Plaintiff, and the Defendant by command of the said William Jackson ousted him: And if, &c. The sole question was, Whether this surrender of the Acre, before the Condition performed, be good or not? Grimston argued for the Plaintiff, That the surrender before he hath performed the Condition, is merely void; for all the interest is out of him, and then he hath not any power to make a surrender; but he agreed, That after the Condition is performed, the Estate is reverted in him, and he may make a surrender. Calthorp for the Defendant argued, That this surrender, upon condition, the Condition being performed before the next Court, and the surrender not presented, the surrender is as if it never had been made, and after such surrender, and before the condition performed, the Copyholder remains still interested, Co. lib. 4. 28. and the Estate was never out of him; so his surrender to another, he being admitted, is good: And of this opinion Jones and my self were, but ceteris absentibus, adjournatur. Residuum postea, pag. 283.

Waller and Petty *versus* Sands. Trin. 7 Car. rot. 374.

11. **A**ction *sur Trover & Conversion* of 200 loads of Timber and 200 loads of Stockwood. Upon Not guilty pleaded, and a special Verdict, the Case was. Tenant for life without impeachment of Waste, excepting voluntary Waste, he in the reversion bargains and sells the Timber trees, growing upon the said Land, to the Plaintiff; the Tenant for life cuts down the trees, and sells them to the Defendant, and he sells them to one Green; and whether the Bargainee of the trees shall have an Action of *Trover* against the Vendor of the Tenant for life, the Tenant for life (cutting them and selling them) being yet alive (as it was found by the Verdict) was the question? Hide for the Defendant argued, That he shall not: For during the life of the Tenant for life, although the Lessor, or he in reversion, hath a general property, yet he hath no authority to sell them. The Tenant for life having a particular interest and authority in them, and his sale being void, his Bargainee hath no interest to maintain the Action. Vid. 21 Hen. 6. 46. Dy. 90. Coke, Lyfords Case, fol. 47. Cok. Lit. 220. Bowls Case, fol. 82. Et adjournatur.

Le Marchant *versus* Rawson. Trin. 7 Car. rot. 732.

12. **D**ebt upon the Statute of *secundo Edwardi sexti*. For not setting forth of *Cythes*: The Defendant pleaded Nil debet, and it was found against him. Germin moved in arrest of Judgment, That

That it was a *Dis-tryal*, and without sufficient warrant: For the *Jurata* upon the *Nisi prius* is, That *Jurat. ponitur in respectum inter le Marchant Plaintiff. & Ramson Defendant. in placito Transgressionis, usque post octab. Mich. Nisi prius, &c.* so by this *Jurata*, which is the Warrant of the Justices of *Nisi prius*, there is not any authority to try the *Issue*, and 'twas held a plain Misprision. But the question was, Whether after *Tryal* this be not amendable; for all the Roll was well? The *Issue* was in debt, and it was a mere Misprision of the Clerk to make it in placito *Transgressionis*, where it ought to have been in placito *Debiti*; and the *Jurata* is not the sole Warrant to the Justices of *Nisi prius* to proceed: For the *Writ* of *Distingas* is to try the *Issue* in placito *Debiti, Nisi prius, &c.* So, that is a Warrant to proceed, although the Record of *Nisi prius* doth not warrant it. And it hath been ruled, That where, upon such *Writ* of *Distingas*, the Sheriff returns *No nina Jurator. inter A Querent. & B Defendant. in placito Transgressionis*, where the *Writ* (to which the *Panell* is annexed) is in placito *Debiti* (being but a Misprision of the Sheriffs Clerk in misciting the *Writ*) it shall be amended; Wherefore the Court would advise thereof.

Gryffyth versus Biddle.

TRESPASS, for taking a Bullock and selling it: The Defendant justifies, because at the Sheriffs Turn, held *infra mensem Pasch. viz. decimo octavo Aprilis sexto Caroli*, the Plaintiff was presented for not appearing at the said Turn, being debito modo summonitus, and amerced by the Jury, which was assessed by four of the Jury at forty shillings, and after, at the next Sessions of the Peace, viz. *viceesimo secundo Aprilis*, it was certified and ratified, by such Justices of Peace; whereupon the Steward made a Warrant unto him to levy it, and so sold, &c. Upon this Plea it was demurred, and Trotman for the Plaintiff took three Exceptions; First, Because the Defendant doth not alledge, That the Turn was kept, *infra mensem post festum Paschæ*, but *infra mensem Paschæ*, which may be as well before Easter as after, and by the Statute of *viceesimo primo Edwardi tertii, capite decimo quinto*, the Turn ought to be kept *infra mensem post festum Paschæ, & post festum Sancti Michaelis. Vid. 7 Hen. 6. 12. 28 Hen. 6. 7. 8 Hen. 7. 4. Dy. 137.* where the Sessions of the Peace is appointed to be kept at one place, & non alibi nisi propter pestilentiam. Being kept in another place, it was held void. The second Exception, Because the Amercement is alledged to be made by the Jury, and assessed by four of the Jurors, where it ought always to be assessed by the Court; for it is a judicial Act, and shall be assessed by the Assessers appointed. See old Book of Entries 507. new Book of Entries 119. The third Exception, That the Amercement was levied by the Defendant, as Bailiff, by Warrant from the Steward of the Court; 13.

where, by the Statute of primo Edvardi quarti, capite It is expressly appointed, That no Fine or Amercement in the Turn, shall be leyed, unless it be certified at the next Sessions of the Peace by Indenture, and inrolled there, and by Process made from the Justices of the Peace of the Sessions to the Sheriff; and none of these circumstances were here observed; wherefore the leyding by warrant from the Steward was ill, and therefore, &c. And of this opinion was all the Court; and thereupon it was adjudged for the Plaintiff.

Favely versus Easton, quod vide ante pag. 269.

14. **W**As now moved again, and argued by Hedly Serjeant for the Defendant, That this Fine is not good: He agreed, That of places known out of any Will or Hamlet, a Fine may be leyed for necessity; as a Precipe may be brought of a Ferry in places known out of any Will or Hamlet, as 34 Hen. 6. 1. 8 Ed. 4. 6. is: But a Fine cannot be of Lands in a Will or Hamlet, by the name of a place known; for the Will being the principal, ought to be named, and the place known, may be known by one name one day, and at another day by another name, according to the name of the parties who are owners thereof; and a Fine ought to be leyed by a name certain, because it is to bind a Stranger by 12 Ed. 4. 37. & 3 Ed. 4. 27. Addition, in a Writ of Debt or other Action where process of out-lawry lies, ought not to be but of the Will or Hamlet, and not of the place known; wherefore, this Fine being of Lands in a place known within a Will, is not good. Noy Atturney-General, è contra, the Fine is good; for the Fine is drawn according to the writ of Covenant, and the writ of Covenant is guided by the Indenture and agreement of the parties, viz. what they agree to pass by such names, and it ought not to vary; And if it vary from the Dæd, the other is not bound to ley the Fine; And he relied upon the Books 21 Ed. 3. 14. 1 Hen. 5. 9. 29 Ed. 3. 11. And all the Justices, seriatim, delibered their opinions, That it was a good Fine; Whereupon it was adjudged for the Plaintiff, ante pag. 269, 270.

Smith versus Hodgeskins. Pasch. 8 Car. rot. 104.

15. **A**ction for words. For that the Defendant malitiosè & falsè crimen Feloniæ ei imposuit, and caused him to be arrested for Felony. The Defendant pleads, That the Plaintiff assaulted him upon the High-way near Higate, and beat him; whereupon he complained to the Constable of this matter, and desired the Constable to attach him, and he refused, unless the Defendant would say, That he charged him with Felony; which speaking, occasioned as aforesaid, is the speaking. Upon which Plea the Plaintiff demurres. And now it was moved by Grimston, That this is no colour of Plea; For the Defendant doth not shew any cause, to charge

charge him with Felony; Therefore it is no excuse or cause of Justification of these words: And of this opinion was all the Court, and gave rule for Judgment for the Plaintiff, unless, &c. Afterward, at the day given, the Defendant by Ward moved, That the Action lies not for these words; For it is, That crimen Feloniæ ei imposuit; which is not in it self cause of Action: And for that he cited a Case to be adjudged in this Court, Mich. 2 Car. betwixt King and Mellor; where Action upon the Case was brought, because crimen Feloniæ ei imposuit, and said to the Constable present, I charge you to arrest him for Felony. And after Verdict for the Plaintiff, it was moved in arrest of Judgment, That these words were not actionable, and adjudged by the Court for the Defendant; and shewed a Copy of the Record: But Jones said he was Judge at that time in this Court, and doth not remember any such Case: But if it were adjudged, it was, Because the words be not laid to be spoken of the Plaintiff. And as this Case is, he conceived clearly, That the Action lies; For it is a malicious scandal, when he chargeth him with Felony; And in his own shewing doth not say what Felony was committed: And of this opinion were Justice Berkley and my self (Richardson chief Justice being absent.) Whereupon rule was given, That Judgment should be entered for the Plaintiff, unless, &c.

Lawrance *versus* Woodward.

Action for words. Because he said falso & malitiosè of the 16. Plaintiff, Thou didst violently, upon the High-way, take my Purse from me, and four shillings two pence in it, and didst threaten me to cut me off in the midst; but I was forced to run away to save my life; And that he accused him before Mr. Chester Justice of the Peace. After Verdict, upon Not guilty, it was moved by Prynne in arrest of Judgment, That an Action lies not for these words; for he doth not say that he robbed him, nor that he feloniously took away his purse: And it may be taken in mitiori sensu, That he took it in jest, or in other manner, which was not felonious; also it is the more enforced, because it was but an accusation before a Justice of Peace, and for an accusation in form of Justice, an Action lies not: And I doubted thereof, Because it is not a direct charge of a felonious taking or robbery, by reason of the Case adjudged, Mich. 10 Jac. betwixt Holland and Stonner, where the Defendant said, Thou art a lewd fellow, Thou didst set upon me by the High-way, and didst take from me my purse, and twenty marks in it, and I will be sworn to it. Being adjudged in the Kings Bench for the Plaintiff, it was reversed in the Exchequer Chamber: For he doth not charge him with felony or robbing of him. But Richardson, Jones, and Berkley held, That the Action lay; For violently taking from him his Purse, and threatening to kill him, and that he was in fear of his life, is a description, That he took it from him feloniously.

loniously and by robbery ; Whereupon Rule was given, That Judgment should be entred for the Plaintiff.

Le Marchant *versus* Rawson, ante pag. 275.

17. **W**As now moved again, and all the Court, *seriatim*, delibered their opinion, That it is but a Default in the Clerk, and is amendable : For the Record being good, and the Clerk having it before him, it was merely a Misprision of him ; And the Justices of Nisi prius having a good Record and a good Issue, and that tryed, it is well enough ; for they have sufficient by the Record it self, by which it appears unto them what is the Issue : And the Writ of Distringas with the Nisi prius is a sufficient Warrant for them to proceed : And all the Court conceived, It is directly within the Statute of octavo Henrici sexti, capite duodecimo, and amendable ; and in the principal Case the Clerk, before and without direction of the Court, had amended it, which amendment was ordered to stand, and that the Plaintiff should have his Judgment : But because it was the Default of the Clerk of the Treasury, to commit such a gross offence, he was fined forty pounds, and the Clerk who made the amendment, without the Courts direction, was committed to Prison. Vid. Dy. 260. 2 Hen. 4. 6. 7 Ed. 4. 15. 2 Ric. 3. 11. 11 Hen. 6. 11.

Fines *versus* Norton. Trin. 8 Car. rot. 1386.

18. **E**Rror of a Judgment in the Common Bench in Assumpsit. The Defendant pleaded Non assumpsit, which was found against him, to his damages of 400 l. and after Judgment, the Error assigned, was, Because upon the Venire facias three and twenty Jurors were returned, and in the Habeas corpora there were four and twenty, viz. the three and twenty, who were returned upon the Venire facias, and one Walter Lambert who was not therein returned, and being returned by Distringas, twelve of them were sworn, whereof the said Walter Lambert was one ; and the Issue tryed by them ; whereupon Judgment being given, this was assigned for Error, and to be a Mis-trial ; for it is tryed by one who was never returned by the Sheriff upon the Venire facias, which was held by all the Court, (who, *seriatim*, delibered their opinions) to be a manifest Error, and not aided by any of the Statutes of 32 Hen. 8. 18. Eliz. or 21 Jac. For a Juror misnamed, is not a Juror, who was never returned by the Sheriff, so as he appearing, is sworn without warrant, and is one added for the pleasure, and peradventure by the nomination of the Plaintiff : And this is *casus omisus* out of all the Statutes, and not remedied by any of them, nor can it be aided by the examination of the Sheriff. But if twelve of the twenty three returned had been sworn, and not the said Lambert, it had been aided by the Statute of decimo octavo Elizabethæ,

as appears in Tyrrell and Gardiners Case ; Wherefore for this cause the Judgment in the Common Bench was reversed. Vid. Co. 5. fol. 42.

Young *versus* Stoell.

Action upon the Case. For disturbing the Plaintiff to exercise the Office of Register in Rochester, and shew, That the Office was an ancient Office, and grantable as well in reversion as in possession ; and that in anno 1622. this Office was granted unto him by the Bishop of Rochester, habendum post mortem vel sursum redditionem of J. S. who held it for life Exercendum per se vel sufficientem Deputatum suum cum Vadiis, &c. Upon Not guilty pleaded, and Tryal at the Barre, the Plaintiff upon the evidence, to prove it was an ancient Office and grantable in reversion, shewed a Grant of quarto Edwardi sexti to one Robinson in reversion, post mortem Bushfeild & Bushfeild, and confirmed by the Dean and Chapter, which was in Esse, in primo Elizabethæ, and that in septimo Elizabethæ he surrendred and took a new Grant to him and J. S. And it was held by all the Court, That this was a good inducement, that it was anciently so grantable in reversion, but being matter of fact, was to be left to the Jury ; But they conceived, if it had not been usually and anciently granted in reversion ; yet being granted before the Statute of primo Elizabethæ, and being in Esse at the time, and the Estate confirmed by the Dean and Chapter, That it was a good Grant. Secondly, where it was moved, That the reversion of an Office cannot be granted by a common person, it was agreed by the Court, That it cannot be granted as a reversion, and by the name of a reversion ; For there is no reversion of an Office, unless it be an Office of Inheritance, yet it may well be granted in reversion, Habendum, after the death of the Grantee for life. Thirdly, It was moved, That this Grant in reversion to Young is void, because he was a person unable at the time of the Grant to exercise it, for he was an Infant of the age of eleven years and no more ; and although it be granted to him, habendum & exercendum per se vel sufficientem Deputatum suum, yet it is not good ; for an Infant cannot make a Deputy : And although at the time when the Tenant for life of the Office died, he was of the age of thirty years, yet being void at the time of the Grant, it cannot be made good by any subsequent Act ; but Jones, Berkley, and I myself, (Richardson being absent) held, That the Grant was good, notwithstanding that Exception : For the Grant is not void, because at that time he was an Infant, or because an Infant cannot make a Deputy : For an Infant who can write and understand the Latine tongue, may be a Register, and may have sufficient knowledge to write and register Acts which is sufficient for his place ; at leastwise he may have sufficient knowledge to make an able Deputy ; and if he put in one who is insufficient, it is cause of forfeiture of the Office ;

Office; but as this case is, it was granted unto him in Reversion, after the death of the then Register, and he being able to exertise it at such time as the Office fell, it is sufficient. Fourthly, It was objected, That the Office was usually granted with a fee of a Robe, or thirten Shillings four pence, and here the Office is granted with the fee of the Robe, and not in the disjunctive, or thirten Shillings four pence, sed non allocatur; for it being after the Grant in the Habendum, shall not make the Grant to be void; and it is only void quoad the fee: And the Court said to the Jury and Counsel, That if they will, they may find the matter specially: But no special Verdict was given, but a general Verdict for the Plaintiff.

Pascha 8 Car. rot.

20. **A** Writ issued out of the Chancery, bearing date decimo tertio Martii, septimo Caroli, to the Sheriff of Gloucester, commanding him per Sacrament. proborum & legalium hominum de Comitatu prædict. to enquire, Qui Malefactores & pacis Regis Perturbatores apud forestam de Deane, sepes & fossata *Johannis Gibbons* ibid. per ipsum nuper levat. noctanter, aut tali tempore, quo factum eorum sciri non credebant, prostrnaverunt, to the damages of the said John, & contra pacem; Et si prædictus *Johan.* fecerit te securum de clamore suo prosequendo, tunc pone per Vadios & salvos Plegios, omnes illos quos culpabiles ibidem inveneris, quod sint coram nobis in quindena Paschæ ubicunque, &c. ad respondendum nobis de pace fracta quam prædicto *Johanni* de transgressione, &c. The Sheriff at quindena Paschæ returned the Enquisition, quod virtute brevis prædict. ad inquirendum (reciting the Writ) per Sacramentum 12. &c. qui dicunt super Sacramentum suum; quod quidam Malefactores, & pacis Regis Perturbatores vi & armis sepes, viz. 769 partiarum sepium & fossarum ipsius *Joh. Gibbons* apud Forestam de Deane, nuper ante per ipsum levat. prostrnaverunt; sed qui aliquam partem inde prost averunt Juratores prædicti ignorant: Et similiter dicunt quod vi armata, & cum multitudine gentium, Malefactores & pacis Perturbatores prædicti fuerunt; Ita quod nullus ad ipsos appropinquare ad ipsos cognoscend. ausus fuit, & talitempore quo factum eorum sciri non credebant, sepes & fossata prædicta prostraverunt & redierunt. And hereupon a Writ of Distringas issued reciting the first Writ, and the Enquisition thereupon returned, and commanding the Sheriff of Gloucester, quod distringat propinquas villatas sepibus & fossatis prædictis circumadjacent. prædictas sepes & fossata prostrata levare ad cultus suos proprios. And by the same Writ it was commanded to enquire quæ damna prædictus *Johan. Gibbons* occasione prostrationis prædictæ 769 partiarum sepium & fossarum sustinuit, & damna illa eid. *Johanni Gibbons* restituere, and to return the Writ and Enquisition in octab. Trin. Hereupon the Sheriff certified, quod Villa de *Bretills*, & vigintialia Villæ (naming them) in the County of Gloucester sunt propinqua Villata sepibus & fossatis
- infra

infra mentionatis circumadjacentes, and further certified, quod damnum in quadam Inquisitione brevi annexat. eid. *Johanni Gibbon*, propter brevitatem temporis restituere non potest; and returned Issues upon every of the said Villages, and that the residue of the execution of the Writ appeared in quadam Inquisitione eidem brevi annexat. and returned the Enquisition, whereby was found, That the said John Gibbons sustinuit damnum occasione præmissorum ad 200l. And upon this return Brampton Serjeant took divers exceptions; First, For the Forest of Dean; There is not any Parish named wherein it lies, sed non allocatur; for a Forest is certain enough by it self. Secondly, Because this Writ is founded upon the Statute of Westminster 2. cap. 46. That if the Lord hath right to improprie any his Waste, &c. and his hedges be destroyed noctanter, and it cannot be known by the Verdict of the Assise or Jury who those Malefactors were, the Towns near adjoyning shall be distrained to levy the hedge or dike at their own costs, and to yield damages: And he doth not shew here, that he is Lord of the said Waste, and hath right to improprie it: But Noy the Kings Atturney, who devised this Writ, said, That it sufficeth in a Writ to shew the grief breviter; And if there be not any such person as may inclose, it ought to be shewn on the other side. Thirdly, It was objected, That this Inclosure is not shewn to be with the Kings licence, and then it is without warrant: But thereto was answered, That it ought to come in by Plea, after appearance, and not by way of exception; It was also moved by Noy, That they had no day in Court, because the Writ and the Enquisition were returned the last Term, and they then not appearing, and pleading, They shall not be received to come in by way of exceptions in this manner. And he shewed a Record Trin. 15 Ed. 1. rot. 3. where such a Writ was awarded for one Nicholas de Stapleton, whose hedges were cast down noctanter, and not being known by whom, he had a Writ to distrain propinquas Villas to repair; and he said, that was the president for this Case; And he prayed a new Distringas might be awarded, Et habuit.

Johns versus Staynar, quod vide ante pag. 272. N. 8.

WAs now moved again by Rolls for the Defendant in the Writ²¹. of Error; and he vouched the Case in Hill. 20 Jac. Calthorp and Culpeper, where Trespass of assault and battery was brought and tryed in Middlesex, and the Bill upon the File was in London, It was resolved, That it was a Declaration and Tryal without Bill, which is aided by the Statute; wherefore it was there adjudged for the Plaintiff. And another president Hill. 22 Jac. rot. 503. betwixt Kelley and Reynell, where debt was brought in Excester, and the Writ supposed it to be within the County of Devon, After Verdict it was held, That the Writ in one County cannot be intended for an Action in another County, and therefore it was a

R n Tryal

Cryal without an Original : But all the Court here held, That this Judgment was erroneous, because this Original is certified as an Original in this Action, which is betwixt the same Parties of the same Land and of the same Term, and being taken out before the cause of Action, it is a vicious and an ill Original, not aided by any Statute ; and compared it to the Bishops Case, Co. 5. 37. Whereupon they all agreed, That the Judgment was erroneous ; and therefore it was reversed.

John George and his Wife *versus* Harvy.

22. **A**ction upon the Case. For that the Plaintiff having communication at Burye, with the Defendant, of his, the said Plaintiffs Wife, The Defendant said, She (*innuendo* the Plaintiffs Wife) is a Witch and a strong Witch. After Verdict, &c. Whitfeild moved in arrest of Judgment, That these words are not actionable, unless he had said, She committed Witchcraft in bewitching some person or his goods, so as she should be punishable by the Statute of primo Jacobi ; for the word Witch generally is but a word of scolding, and most commonly used of bewitching one with his words or countenance ; and he said, it was so adjudged in decimo sexto Jacobi, betwixt Hawkes and Auge : But it was alledged on the other side by Grimston, That Mich. 4. Car. betwixt Hughs and Farrer, for calling one Witch, and that she had bewitched his drink, it was adjudged that the Action well lies : But because it was said there were precedents both ways, the Court would advise. Residuum postea, pag. 324.

Collis *versus* Malin. Trin. 8 Car.

23. **A**ction for words. Whereas the Plaintiff had used per magnum tempus the Trade of buying and selling of Cattel, and divers times bought upon his credit : That the Defendant said of him Thou art a Bankrupt ; the Defendant pleaded Not guilty, and found against him ; And because he did not say, That he used the Trade at the time of the words speaking, but per magnum tempus usus fuit, which may be divers years before : And the Action lies not, unless at the time of speaking the words, he used the Trade of buying and selling of Cattel ; Therefore it was adjudged for the Defendant.

Parker *versus* Grigson. Trin. 8 Car. rot. 130. or 1306.

24. **E**jectione firmæ. After Verdict it was moved by Grimston in stay of Judgment, That there was not any Bill upon the File ; And it was prayed, That the Court would order that none might be filed : But the Court held, it to be aided by the equity of the Statute of decimo octavo Elizabethæ, and in Woodhouse and Willis Case, Trin. decimo sexto Jacobi, rot. 945. so resolved in a Writ of Error ;

Error; Wherefore Judgment was given for the Plaintiff, notwithstanding this exception.

Stirley versus Hill.

Action for words. For that he said to the brother of the Plaintiff, Thy brother was whipped about Taunton Cross for stealing of Sheep, or burned in the hand or the shoulder. After Verdict, upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, That these words do not import any certain slander: And of that opinion was all the Court; Wherefore it was adjudged for the Defendant. 25.

Gryfill versus Whitchcott. Trin. 8th Car. rot. 420.

Demurrer in Ejectione firmæ. The question was, If one mortgage Land for 100 l. and takes Bond for the interest of 8 l. per annum, payable half yearly, whether that makes the Bargain usurious against the Statute, Because as it was pretended, the use ought not to be paid until the end of the year, and contracting to have half of it yearly, is not warrantable by the Statute? But the Court, upon the first argument at the Barre, over-ruled it, That it is not any usurious Contract, contrary to the Statutes, because the 100 l. is let for a year; and the reservation is not of more, but of what is permitted by the Statutes; And although the Interest is reserved payable half yearly, it is allowable; For he doth not receive any interest for more or less time than his money is forborne; Wherefore, without difficulty, it was adjudged for the Plaintiff; And Error being brought in the Exchequer Chamber, and the Error assigned in point of Law, the Judgment was affirmed. 26.

Burgaine versus Spurling. Vid. ante pag. 273. N. 10.

This Case was now argued again. And it was strongly urged for the Plaintiff, That by the first surrender, all the Estate of the Copyhold until the Condition performed, is out of the Surrenderor, so as he hath not any interest left in him to make another surrender, although he afterwards should perform the Condition; for he cannot make the second surrender, which was void, to be good: But when the Condition is performed, the Estate is rebeited in him; and then he might well make the third surrender. But it was thereto answered, and resolved by the Court, That the second surrender is not hindered by the first; for nothing passed thereby, until it was presented in Court, and admittance thereupon; but the interest and right of the Copyhold, and the possession remained with him who made the surrender, so as he may transferre it to any other, and it shall be good, if the first surrender doth not

take effect : For the Surrender into the hands of the Tenants, was but an inchoation of his Estate, to whose use the Surrender was made, and such an inchoation as had no perfection, but became meerly void, and the second Surrender good. As a bargain and sale to one, and after a bargain and sale to another ; the first is not inrolled, but only the second ; the second is good. So a Grant of a reversion to one, and before Attornment, a Grant thereof to another ; and to the second Grant, Attornment is made, the second Grant is good, & nihil operatur by the first. So where a fine is acknowledged to one, upon a Dedimus potestatem, and afterward a second is acknowledged, and the first fine not recorded, the second fine is good : But if the first fine had been recorded in Court in time convenient (viz.) the next Term, it had been good, and the second had been meerly void. So this first Surrender, when it was not presented at the next Court, is as if none had been made, and meerly void ab initio, and therefore the second Surrender good. Secondly, All the Court agreed, That whereas in the principal Case, the Condition was for the payment of 1060 l. upon the first of July, and the payment was made before the first of July, viz. upon decimo sexto Junii, and an acceptance thereof, it is a good performance of the Condition. Note that the first Surrender is meerly void, and as if it never had been made, and that after the Surrender, he who Surrendered remained always Copyholder, so as it should descend to his Heir, and he might dispose thereof. But if the first Surrender had been presented at the next Court, that would have so bound the Land, as all mean Acts done or made afterwards, would have been void. Judgment for the Plaintiff.

Delves versus Clerk.

28. **A** Sumpsit. Whereas the Defendant was seized of such Lands in Cheshelhurst in the County of Kent, vicesimo primo Maii 1631. in fee, and was in communication with the Plaintiff, to sell the same for such a summe, That the Defendant, Ad tunc & ibidem, viz. prædicto vicesimo primo Maii, anno 1631. apud London, prædict. in Parochia beatæ Mariæ, &c. in consideration of such a summe, promised to assure, &c. Upon Non assumpsit, the Tryal was in London, and exception taken in arrest of Judgment, That it was a Bil-tryal, and not aided by any of the Statutes : For it ought to have been tryed in Kent where the Land lies, and where, by the Ad tunc & ibidem, the promise is, and the Venue cannot be altered : And of this opinion was all the Court, That the Videlicet is idle, and may not alter it ; Whereupon a Venire facias de novo was awarded.

Cucko

Cucko versus Starre.

Prohibition was prayed to the Spiritual Court to stay a Suit^{29.} there for defamation, for these words, Thou art a Drunkard or a drunken Fellow. And by the opinion of Jones, Berkley, and my self, a Prohibition was granted: For these words do not concern any spiritual matter, but merely temporal, and they be but convitium temporale, and a common phrase of brawling, for which there ought not to be Suit in the Spiritual Court; and so it was held in Martyn Calthorps Case, in the Common Bench: But Richardson doubted thereof, because the Spiritual Court as well as the temporal may meddle with the punishment of Drunkenness; so it is not merely temporal: But he assented to the grant of a Prohibition, and the party may, after declaration (if he will) demurre thereto; Whereupon a Prohibition was granted.

Major versus Talbot. Pasch. 8 Car. rot. 419.

Covenant. Whereas one Selbie and Elizabeth his Wife, were^{30.} seised of such an House and Land, to them and the Heirs of the Husband, and so seised, by Indenture, let that house and land to the Defendant, wherein he covenants with them, and either of them, and with the Heirs and Assignes of the Husband, for doing all reparations: The Husband and Wife conveyed that reversion to the Plaintiff in fee, who brings Covenant for not repairing of the said house, declaring upon all this matter, and concluding, quod Actio ei accrevit, as Assignæ to the Husband, and abetres not the Wife to be dead. Hereupon the Defendant demurres, which was argued by Rolls for the Plaintiff, and by Merefeild for the Defendant, and by him much insisted, That the Plaintiff having his Estate, as well from the Wife (who had an Estate for life) as from him who had the fee, ought to have brought Covenant as Assignæ to both, and not as Assignæ to him who had the Inheritance, unless the Wifes death had been alledged; And for that purpose, he cited Treports Case, Co. 6. fol. 14. & Dy. 234. But all the Court held, That the Action is well brought, being brought by the Assignæ of him who hath the Inheritance, and so no prejudice to any, and the Estate for life, being transferred with the fee, is thereby drowned and confounded; so as he being Assignæ of the whole Estate, and shewing all the matter, it is good enough; Wherefore it was adjudged for the Plaintiff.

Kerchevall versus Smith &

Action upon the Case against them, Because they being^{31.} Church-wardens of presented the Plaintiff false & malicious upon a pretended fame of incontinency. Upon Not guilty,

guilty, it was found for the Defendants, and moved, That they might have double costs, because they were troubled and vexed for matter which did concern their Office: But it was resolved, It was not within the Statute; for it is merely ecclesiastical; and the makers of the Statute never intended to give double cost, but where men are vexed concerning temporal matters, which they shall do by virtue of their Office, and not for presentments concerning matters of fame.

Nevill *versus* South and Delabarre, in the Exchequer Chamber.

32. **E**rror, brought in the Exchequer Chamber of a Judgment in a Scire facias by an Executor, to have execution of a Debt recovered by the Testator. And it was now moved, That the Record was not well removed; for no Writ of Error lies there, upon a Judgment in a Scire facias; for the Statute giveth it only in seven several Cases, viz. in Suits or Actions of Debt, Detinue, Covenant, Accompt, Actions upon the Case, Ejectione firmæ, or Trespas; So a Scire facias is not mentioned; and it hath been adjudged, That Error lies not there of a Judgment in a Scire facias against bail, nor in a Writ de scandalis Magnatum. But the Court doubted whether this Scire facias, being grounded upon a Judgment in an Action of Debt, be not within the equity of the Statute; Therefore they would further advise.

Hitchman *versus* Porter. Trin. 8 Car. rot. 483.

33. **E**rror of a Judgment in the Common Bench. The Error assigned was. Whereas an Action upon the Case was brought in nature of a Conspiracy, That the Defendant falsly & malitiously imposed upon him crimen talis felonie, and caused him to be arrested thereupon, and bound over to the Assizes, and exhibited a Bill of Indictment against him for that supposed Felony, and caused him to be indicted and detained in Prison, until he was Legitimo modo acquietatus; And he doth not say (inde) which was a principal word, and the principal cause of damages: And it was said, That betwixt Stiles and Pricket, for this point, Judgment was reversed; And that in this Term, for this default in the like Action, betwixt the same parties, Judgment was given, Quod querens nihil caperet per breve; And this Judgment here in question passed sub silentio: Sed adjournatur, residuum postea; pag. 315.

Lyster *versus* Bromley. Trin. 8 Car. rot. 235.

34. **E**rror of a Judgment in the Common Bench. Debt, by the Under-Sheriff for his fees, where he demanded 12 l. 10 s. for executing of a Capias ad satisfaciendum of 400 l. The Error assigned was, because he demanded more for his fees than the Statute

tute of vicesimo octavo Elizabethæ allowes, viz. whereas he ought to have but six pence for every pound where the Execution is above 100 l. and twelve pence for every pound where the Execution is but 100 l. or under; he taking 5 l. for the first 100 l. and 50 s. for every of the other hundred pounds, had taken more than six pence in the pound for the said Execution of 400 l. And for this cause the Error was assigned, but a president shewn, Hill. primo Caroli rot. 721. betwixt Jellon and Westley in this Court, where it is adjudged what a Sheriff ought to have for his fees (viz.) 5 l. for the first 100 l. and 50 s. for every other 100 l. over and above the first hundred pounds: Otherwise if the Execution should be for 120 l. or 160 l. he should have less, then for the Execution of 100 l. which never was the intent of the Law; for the Law gives allowance to the Sheriff for executing Process, which by construction shall be most favourably taken, and according to the intent of the Law-makers, and not that he shall have less for the Execution of 140 l. then for the Execution of 100 l. And another president was shewn, Pasch. 14 Jac. rot. 537. where was the like Judgment: And of this opinion was all the Court (absente Richardson) but we would advise. And the next day after, Richardson chief Justice being in Court, it was moved again, and the Record of this Court Hill. primo Caroli, betwixt Jellon Sheriff of Coventry and Westley was produced, where in he declares in debt for his fees (for taking Execution of a Judgment of 400 l.) 12 l. 10 s. And upon this Declaration it was demurred, and two questions then made: First, Whether the Sheriff may demand twelve pence in the pound for the first 100 l. and six pence after, for every 100 l. or that he ought to have but six pence in the pound, where the summe exceeds above 100 l. And it was adjudged, That he shall have twelve pence for every pound of the first 100 l. and six pence for every other pound over the 100 l. Secondly, Although it be provided in the Statute of vicesimo nono Elizabethæ, That this shall not extend to Sheriffs of Cities or Corporations, it was held, That it was only to be intended for the executing Judgments in the Courts of the said Corporations, and not to the Sheriffs of Cities or Corporations, for the executing Judgments out of Superior Courts. Another president was shewn Pasch. 4 Jac. rot. 551. Proby versus Michell, in an Action of Debt for fees, and adjudged accordingly. And whereas Grimston cited a Case in the Common Bench, Mich. 17 Jac. betwixt Symon and Bathurst, where the opinion was, That the Sheriff ought to have but six pence in the pound where it is above 100 l. And that the Judgment was there entred for the Defendant. Jones said, the reason of that Judgment, was not for the cause now alledged, but for that the Sheriff had taken a Bond for his fees, and had brought an Action of Debt upon that Bond, and the Defendant had pleaded the Statute of vicesimo tertio Henrici sexti, in avoidance thereof. The Court there conceived, although he might have such fees as were allowed by the Statute, yet he might not take

take Bond for them ; for under colour thereof he might so have double fees, &c. Wherefore here, after argument, the Judgment was affirmed.

Drake versus Corderoy. Mich. 7 Car. rot. 280. or 28.

35. **E**Rror of a Judgment in the Common Bench, in Action for words. Whereas the Plaintiff was Constable of D. and sworn before the Justices of Peace in the County of Wilts, at their Quarter-Sessions, concerning an Affray made by the Defendant upon one Fisher : That the Defendant, ad tunc & ibidem in the said Court, in the presence of the Justices, said, He (innuendo the Plaintiff) is foresworn. Without any mentioning of the said oath, the Defendant justifies, shewing the oath which he made in the open Sessions, and that it was false. Upon which justification the Plaintiff takes issue, which was found : and Judgment for the Plaintiff, and Error assigned, That the words be not actionable, because he doth not say in the declaration, That he was foresworn, by his oath taken in any Court, and to say generally, That the Plaintiff is foresworn, Action lies not ; but to say he is perjured, Action lies. And here it is not shewn, That he was foresworn by reason of his oath taken at the Sessions ; wherefore the Declaration is not good, nor is it aided by the Plea. But all the Court held, That if there were any doubt, it was upon the Declaration, which is uncertain, Because he doth not shew, That the words intended a false oath in a Court of Record : Yet when the Defendant by his Plea confesseth he spake those words by reason of his oath taken at the Sessions, that clears the question, whereof he intended to speak ; Wherefore the Judgment was affirmed.

Bland versus Inman. Hill. 7 Car. rot. 550.

36. **T**Respass. Upon a special Verdict the Case was, Thomas Spence possessed of a Lease for a 100 years by Indenture, betwixt him and Joan his Wife of the one part, and Tisdale on the other part, which is found to be sealed and delibered only by Spence, and not by his Wife, assigns all their Estate in the Lease to Tisdale, redendo & solvendo to him and Joan his wife, durante termino prædicto, to them and the Survivors of them, if they shall live so long, 7 l. at Michaelmas and the Annuntiation, with a Proviso, That if the said Rent be behind at any of the said Feasts, or fourty dayes after, and not paid to him or his wife, or the Survivors of them, That then it shall be lawful to the said Spence and his wife, and to the Survivors of them, and to their Assignes, and to the Assignes of the Survivors of them, to re-enter and have again, as in their former Estate. Tisdale enters, and Spence dies, and Joan survives him,



him, and for forty days after the Annuntiation next following, the Rent being behind and not paid, the Wife the last day demands it; and one Walter the Administrator of Spence demands also the rent which is not paid. Tyfdale assigns his Estate to the Plaintiff, and Walter, as Administrator of Spence, enters for non-payment, and lets to the Defendant; And if, &c. This Case was oftentimes argued at the Barre, and after at the Bench; The first question was, Whether this reservation be good to the Wife, because she had not any interest to pass, and never sealed the Dēd? And if it be not good to the Wife, because she is a Stranger to the Interest and to the Dēd, whether it be not good to the Husband, and to his Executors and Administrators as Assignes in Law, during the time of the Wifes life? And whether the Administrator, for the benefit of the Wife, shall not enter into the Land? And it was urged by Mr. Grimston on the part of the Defendant, That the words being reddendo & solvendo to the Husband and Wife, durante toto termino, and to the Survivors of them, it being by Indenture, is good, by way of reservation to the Husband; and the word solvendo shall be construed as by way of grant to the Wife: For although she did not seal, yet she being named in the Dēd, and the party Grantor sealing and deliberating it to the Husband and Wife, It shall be construed by way of grant to her; and she may take by the Dēd, being named therein, although she never sealed any part thereof: And of that opinion was Barkley Justice, and cited one Constables Case, That where Lessee for years assigned his term, rendering rent durante termino annually unto him, that includes his Executors and Administrators, although they be not named, as in the Case of Litt. Condition to pay a summe to a feoffee such a day, and he dies before the day, it shall be paid to his Executors, for they represent the Testator. To the second, Barkley conceived, If it be not good to the wife, neither by way of a Reservation, as he agreed that could be, because she is a Stranger to the Estate and to the Dēd; yet by way of grant, by the words reddendo & solvendo, he conceived, the Dēd might take effect; yet he held, That the Administrator is Assignee, who may enter for the Condition broken, for the wifes benefit. But Richardson chief Justice, Jones, and my self agreed, That although the reddendo & solvendo durante termino, if there had been no more said, had been a reservation during the term: Yet when he doth not rest upon the exposition of the Law, but it is, Rendering to him and his Wife, and the Survivor of them, if they live so long; that is an express reservation that it shall not be during all the Term, but to him and his wife and the Survivors of them: And the reservation to his wife is void, because she is no party in Interest or to the Dēd; and to the Survivor of them is void also, to give the wife any advantage thereby; And therefore the rent endures no longer than during the life of the Husband. Vid. 10 Ed. 4. 18. 21 Hen. 7. 25. Co. lib. 8. fol. in Whitlocks Case, Co. Lit. 47. & 143. and Hillary 33 Eliz. between Richmond and Butcher, Where one lets reserving rent to

him his Executors and Assignes, he having an Inheritance in the Land, it was adjudged a void reservation to the Executor, the reversion being in the heir; yet the rent shall not be paid unto him because he is not named; and although it were there, durante termino, it was not material. And Jones said, That so it was adjudged betwixt Brown and S. secundo Caroli. Also they all held, That here this word Solvendo cannot inure by way of grant to the Wife, when it is by way of reservation to the Husband: For it shall not be construed to inure in several manners, no more than if one bargains, sells, demiseth, and grants, it shall not inure by bargain and sale and demise, but by the one of them, at the election of the Bargainee. And in the Reservation, Assignee is not mentioned: So that it cannot give any interest to the Administrator as Assignee in Law. And in the Proviso Assignee is mentioned, but that is to the Assignees of the Survivors of them: So that the Assignee in Law of the Husband cannot claim it; for he did not survive, but the Wife. And the Wife can take no advantage of the Condition, because she is a Stranger to the Estate and to the Debt, seeing she did not enfeale the Debt: And if the Condition should go to the Wife, yet she cannot enter for the Condition, but only the Administrator of the Husband, who hath not any title of entry: And the Defendant claims by him; Wherefore it was adjudged for the Plaintiff. And upon this Judgment, a Writ of Error was forthwith brought, returnable in the Exchequer Chamber, and the Judgment was there affirmed, Mich. decimo Caroli.

Termino



Termino Hillarii, anno octavo *Caroli* Regis,
in Banco Regis.

Carlion versus Mill. Hill. 7 Car. rot. 1147.

Action upon the Case. For that the Defendant being an Apparator under the Bishop of Excester, maliciously, and without colour or cause of suspicion of incontinency, of his own proper malice procured the Plaintiff ex officio, upon pretence of fame of Incontinency with one Edith; (whereas there was no such fame nor just cause of suspicion) to be cited to the Consistory Court of Excester, and there to be at great charges and vexation, until he was cleared by sentence, which was to his great discredit and cause of great expences and losses, for which, &c. Upon Not guilty pleaded, and found for the Plaintiff, It was moved by Ashley Serjeant, in arrest of Judgment, That in this case, an Action lies not; For he did nothing, but as an Informer, and by vertue of his Office. But all the Court (absente Richardson) held, That the Action well lies; For it is alledged, That he falsly & maliciously caused him to be cited, upon pretence of Fame where there was no offence committed: And averres that there was not any such Fame; so as he did it maliciously, and of his own head, and caused him to be unjustly vexed, which was to raise gain to himself; Whereupon they conceived he being found guilty for it, the Action well lies, and therefore Rule was given to enter Judgment for the Plaintiff, unless other cause was shewn: And upon a second motion, Richardson chief Justice being present, Judgment was given for the Plaintiff.

Hopestill Tildens Case. Ante pag. 264.

Note that the first day of this Term, Hopestill Tilden was arraigned at the Barre for Buggery, supposed to be committed at Hide, being one of the Cinque Ports, he being Endited there and the Record removed hither by Cerciorari, directed to the Mayor and Jurats of the said Hill, and not to the Lord Warden of the Cinque Ports. The Prisoner challenged one of the Jurats, being the foreman, who was sworn, and marked, sworn by the Clerk, before the challenge was heard by the Court: And therefore without the assent of the Attorney General then present, they would not alter the Record, and because he would not assent to al-

ter the Record, the challenge was disallowed. And afterwards upon evidence at the Barre, divers witnesses were produced by the Defendant, which were heard without Oath: But some of them witnessing matter, which the Atturney conceived would make for the King, were upon the desire of the said Atturney sworn, and after ordered upon their said Oath, to deliver their knowledge. And afterward, the Prisoner was acquitted. But because the evidence (if it had been believed by the Jury) was very strong against the Prisoner, Richardson chief Justice and Jones appointed, that the Prisoner should be bound to his good behaviour: Whereupon, against the opinion of my self and Justice Berkley, he was so bound.

Rose versus Bartlett. Trin. 7 Car. rot. 497.

3. **E**jectione firmæ. Of the demise of John Rose and Elizabeth his wife, of fourty acres of Land, and two acres of Meadow in Burnham for thre years. Upon Not guilty a special Verdict was found, That Philip Scudamore was seised in fee of the Land in the Declaration, anno 44 Eliz. and by Indenture demised it, by the name of four Closes of Pasture in Burnham, for a hundred years to Richard Batyne: And that Richard Batyne entred and was possessed, and being so possessed, and seised in fee of other Lands and Tenements in Burnham. Afterwards, viz. duodecimo Aprilis, tertio Caroli, made his will in writing, which is found in hæc verba, I will, That my wife *Elizabeth* shall have *Burnhams* and the Lands thereunto belonging, being three half acres in *Lentfeild*: And my will is, if she do marry, My Son *Nicholas* shall have *Burnhams*, and three half acres lying in *Lentfeild*. Item I will, my Son *Bartholmew* shall have for his maintenance out of the Land 5 l. yearly, as long as she keepeth her self unmarried. Item, I will and bequeath to my said wife *Elizabeth*, all the rest of my Lands lying in the Parishes of *Burnham* and *Hitcham* during the time of her life, and afterwards to my Son *Bartholmew*. Also I make my wife, my full and whole Executrix of all my Cattle, Corn and moveable Goods: Except such as I have appointed to be sold for payment of Legacies, prout *per le volunt.* &c. They find that Richard Batyne dyed and the said Elizabeth proved the Will in the Prerogative Court, Quodque Administratio omnium bonorum jurium ac Creditorum dictum *Richardum Batyne* & ejus Testamentum qualitercunque concernent. by the Judge of the Prerogative Court was committed to the said Elizabeth, that she afterward took to husband the Defendant, whereby they were possessed of the said Lease: And that the said Bartlett, assigned that Lease to Richard Hammond upon condition for the payment of 30 l. at a day certain who failing of the payment thereof, reassigned afterwards that Lease to the Defendant, that the said Elizabeth dyed; and afterwards the said Bartholmew dyed, and that Elizabeth the wife of Bartholmew obtained Letters of Administration de bonis

bonis *Richardi Batyne* non Administrat. by Elizabeth the wife of Richard Batyne, who took John Rose to husband, and they let to the Plaintiff, and the Defendant ousted him, and if, &c. This Case was argued by Calthorp for the Plaintiff, and by Germin for the Defendant. The first question was, Whether this Lease for years, be devised to Elizabeth for life, Remainder to Bartholmew? And all the Judges (absente Richardson) resolved, That if a man hath Lands in fee, and Lands for years, and deviseth all his Lands and Tenements, the fee simple Lands pass only, and not the Lease for years: And if a man hath a Lease for years, and no fee simple, and deviseth all his Lands and Tenements: the Lease for years passeth; For otherwise the Will should be merely void. Secondly, they all agreed, That if one deviseth his Land, which he hath by Lease, to his Executor for life, the Remainder over, that there ought to be a special assent thereto by the Executor, as to a Legacy, otherwise it is not executed: And there was not here any special assent. Thirdly, Jones and my self were of opinion, That it appears here that he had other Lands in fee, which he devised to his wife durante viduitate: and other Lands which he devised unto her for life, the Remainder over, and then that devise may not extend to that Lease. But Berkley to the contrary, because it may be that the Land devised as long as she is unmarried, is the sole Land which he had in fee: And the other Land devised absolutely, is the Lease for years; But it was thereto answered, That the devise is unto her for life, of the Lands in Burnham and Hitcham, and clearly no part of the Lease-land extends into Hitcham; so as it is clear, it extends not to Lease-lands but to Freehold-lands. Fourthly, Richard Batyne making his wife his sole and whole Executrix, of all his Cattle, Corn, and moveable Goods, and not mentioning what shall be done concerning the residue of his Estate; Whether the wife be absolute Executrix quoad all his Estate, or only particular Executrix quoad his Cattle, Corn and moveable Goods, and not quoad his Leases, and his Debts? And as touching that point we all agreed, That one may make several Executors; the one quoad things real, the other quoad things personal, and may divide their authority; yet quoad Creditors, they are all Executors and as one Executor, and may be sued as one Executor, 19 H. 8. 8. Dy. fol. 3. 32 H. 8. Br. Exec. 155. But Jones Justice and my self conceived, as this case is, That she is sole and absolute Executrix for the whole Estate, as well Leases as Debts, and other things: For when he saith, that she shall be his sole and whole Executrix of his Cattle, Corn and moveable Goods, it is but an enumeration of the particulars, and no exclusion of any, especially when he doth not make any other Executor for the residue: And Catalla in Latine extends to all things. And it may be intended, that so was his intent, when he made not any other Executor. But Berkley Justice conceived, that she is a special Executrix quoad the things enumerated, and no general Executrix. The fifth question

tion was, Admitting that she is no absolute Executrix quoad all the Estate, but quoad the particulars specially named, and she proving the Will, and it being found, that Administration was committed unto her omnium bonorum, &c. prout antea, Whether that be a general Administration committed, or only an Administration of the Goods whereof she was made Executrix? And Berkley held, That it is but a special Administration, because it is Bonorum jurium & creditorum prædict. Rich. Batyne & prædict. Testament. concernent. and that coupled to the Testament; so that it extends no further than the Will. But Jones and my self were of opinion, That it was a general Administration committed; For Jurium & Creditorum are general words, and the word (&) should be expounded as (aut) and it cannot be tyed only to the Testament; For there be not any words of Debts, as Creditorum imports: And they be as general words, as are usual in general Letters of Administration; Wherefore upon all the matter, Justice Jones and my self were of opinion against the Plaintiff, That he should be barred. But Justice Berkley è contra per quod Adjournatur.

Sir Thomas Fynch *versus* Lambe. Mich. 5 Car. rot. 295.

4. **E**rror of a Judgment in the Common Bench in an Assumpsit. Supposing that the Defendant, decimo sexto Jacobi apud Bury in Suff. promised to pay, &c. After Verdict and Judgment upon non Assumpsit pleaded, and found for the Plaintiff, The Defendant brings Error, and upon diminution alledged, The original was certified Hill. quarto Caroli, upon which the Plaintiff in the Writ of Error pleads the Statute of vicesimo primo Jacobi, of limitations: And that this Action being upon a Promise in decimo sexto Jacobi, and not brought within six years after the Promise, nor within three years after the Statute, that this Action is not maintainable. The Defendant pleads, That he, secundo Caroli, which was within three years of the Statute, brought a Writ original of Assumpsit, supposed to be made in Kent against the Defendant, now Plaintiff in the Writ of Error, wherein he was outlawed. But in tertio Caroli, the outlawry in the Common Bench, was declared void, and he discharged. And that within a year after he brought this Action, and supposeth the Promise to be made at Bury to his damages of 600 l. And in the former Action the Assumpsit was alledged to be made in Kent to his damage of 500 l. and averres, That it was one and the same promise, and cause of Action: And upon this Plea the Plaintiff in the Writ of Error demurred, and Twisden shewed the cause to be, For that this new Action varies in the County from the Assumpsit, and in the damages alledged, and so cannot be intended one and the same cause of Action, nor to be a new Suit begun for the same matter. Also I conceived, that for as much as this outlawry was not reversed by Error; but avoided

voided by Plea, the first original is not determined. But he might have proceeded thereupon; and then to begin a new Original, and in another County, is not according to the Statute of vicesimo primo Jacobi, nor within the intent of the Statute. But Richardson, Jones, and Berkley held, That this variance of the County and damages is not material to the Action, being transitory, and abridged to be for one and the same cause; And although the outlawry is not reversed by a Writ of Error, but avoided by Plea, it is all one within the intent of the Statute; For the Statute is not where the outlawry is reversed by Error, but where the outlawry is reversed, so it is by any means. Wherefore upon their three opinions, a Rule was given, That Judgment should be affirmed, &c.

Eyres versus Taunton. Trin. 7 Car. rot. 390.

Scire facias in Chancery. Upon a Recognisance of 200 l. by 5.
 Sone Cawley, who was returned dead; whereupon a second Scire facias issued against the Heir of Cawley, and against the Tenants of the Lands and Tenements of Cawley, which he had tempore Recognitionis vel postea: Whereupon the Sheriff returned the Defendant Taunton *Terr-tenant* of such Lands, and omitted to return any thing concerning the Heir. And upon this the Defendant pleads, That the said Cawley had nothing in the said Lands at the time of the said Recognisance, or ever after: And upon this they were at Issue in Chancery, and it was sent hither to be tried; and it was tried, and found for the Plaintiff, That Cawley was seised, &c. And after Verdict for the Plaintiff, Mallet for the Defendant moved in arrest of Judgment, Because nothing was returned concerning the Heir, viz. That there was not any Heir, or that the Heir had nothing: Therefore no Judgment shall be given; For it is a non-Return of the Sheriff, and not a mis-Return; And it is not aided by any of the Statutes of 32 H. 8. or 18 Eliz. or 21 Jac. of Jeofayles: The Reason he alledged that no Judgment ought to be given, was, Because the *Terr-tenant*, without the Heir, was not to be charged, and therefore the Heir ought to be summoned; And until the Heir be summoned, or that it be returned, That there is not any Heir to be summoned, or that the Heir hath not any Lands to be charged, the *Terr-tenant* ought not to be charged; For the Heir might have a release to plead, or other matter to barre the Execution; and his Land is rather to be charged than the Land of the *Terr-tenant*; For the Heir shall not have contribution against the *Terr-tenant*, as the *Terr-tenant* shall have. Also if the Heir be within age, the Paroll shall demurre, and the *Terr-tenant* shall have advantage thereof; And therefore, there being nothing returned concerning him, he moved, That no Judgment ought to be given. Richardson, Jones, and Barkley held, That the Return was not good, Because the Plaintiff names and sets forth, that there is an Heir, and there is no Return quoad the Heir; so as to him it is quasi

quasi Breve album, and no Return, and is not aided by any Statutes. But I was of a contrary opinion, Because the Defendant hath omitted to take advantage thereof; For having pleaded, and the Issue being found against him, he shall not now take advantage for not returning the Heir to be summoned: For it may be that there is not any Heir, or that the Heir hath no Land, or may not be found. Vid. 17 Ed. 2. Execut. 139. 18 Ed. 2. ibid. 142. That the *Terr-tenant* in a *Scire facias* shall not be warned until it be returned, that there be not any Heir, or that the Heir is warned, and comes not in. Vid. tertio Henrici quarti fol. decimo tertio, a *Scire facias* hæredi & *Terrtenenti*. The Sheriff returns such a *Terr-tenant* warned, and speaks nothing of the Heir, yet the *Terr-tenant* was enforced to answer. And after, ad informandam Curiam, whether there was an Heir, it was ordered, That a new *Scire facias* should be awarded.

Hillary, primo Caroli, The Case inter Bowyer & Rivett was cited by Justice Jones, That in a *Scire facias* against the Heir and *Terr-tenant*, he is charged only as *Terr-tenant*: And by pleading *Riens per descent*, and found against him, The Execution was of the moiety of his Land, and not of all, as the Heir should have been charged upon a false Plea. Resid. post. pag. 312.

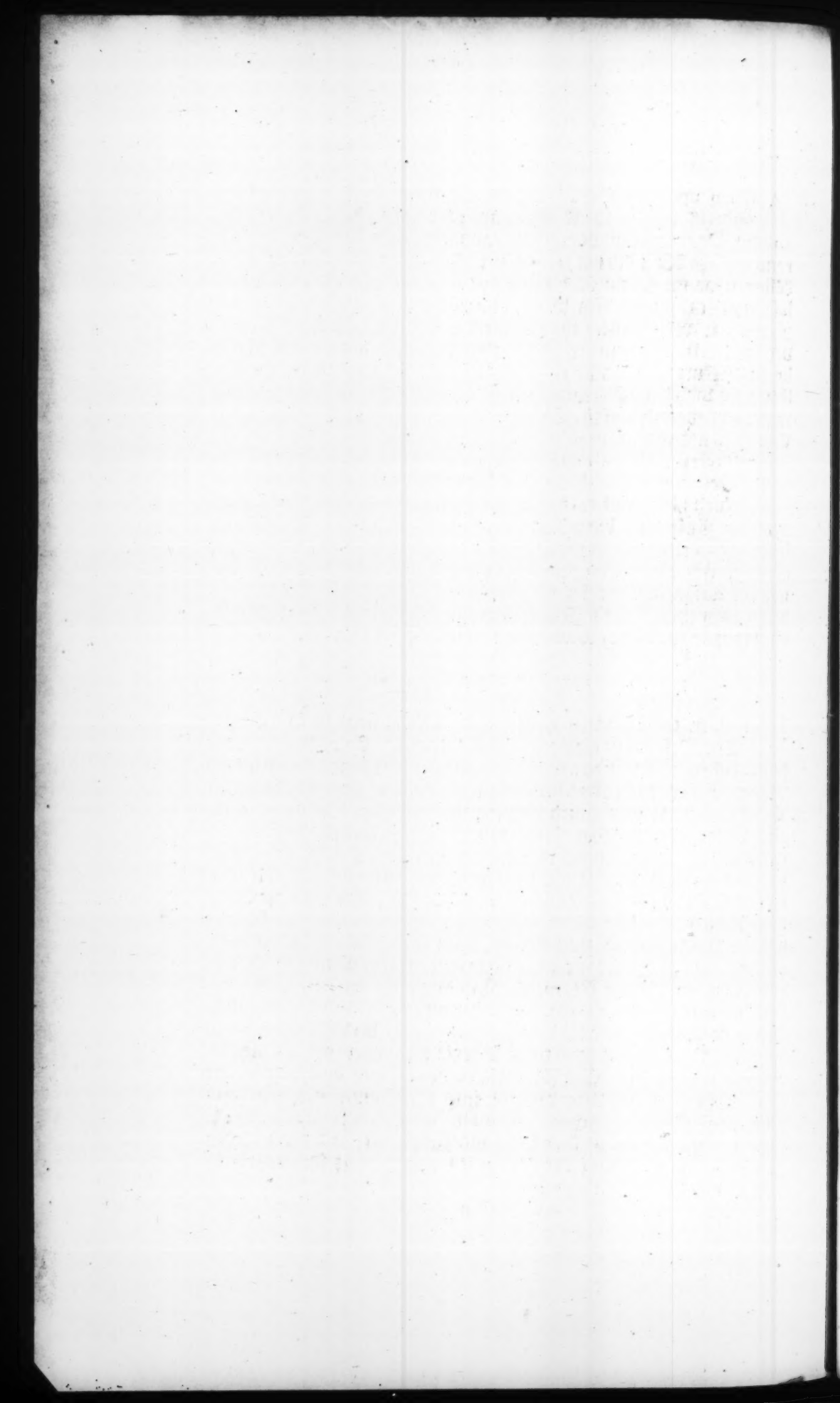




A Crion upon the Case. By an Executor against the Sheriff, for that the Testator upon recovery, had a fieri facias, and the Defendant made execution and leyed the Debt, and at the return of the Writ did not return it: And after the Testator died; Whereupon the Plaintiff, for that *tort* in vita Testatoris, and for the loss which came unto him, brought this Action: And upon Not guilty pleaded, it was found for the Plaintiff: And thereupon Glynn moved in arrest of Judgment, That this Action is not maintainable by an Executor: Because it is a personal wrong done unto the Testator, for which the Executor hath no remedy: For he hath not any remedy by the course of the Common Law for such personal wrongs: And it is not maintainable by the equity of the Statute of quarto Edwardi tertii, de bonis Testatoris asportatis, and for that purpose he cited a Case, tertio Caroli, in this Court betwixt Levalston and Diskins (which Jones Justice said, he well remembred) where an Action upon the Case was brought by an Executor against a Sheriff, for suffering an escape upon mean process, in the time, and at the Suit of the Testator: And because it was a personal wrong to the Testator, the Action lay not for the Executor. But note no Judgment was given there, for the Court was divided therein: So here, &c. Whereupon the Court would advise until the next Term.

Lutterell *versus* Lea.

Debt, in the Common Bench, upon a Judgment in this Court. The Defendant pleaded, *Nul tiel Record*. And upon that, the Plaintiff there obtained a Certiorari out of the Chancery, to send the Record thither, which by Mittimus might be sent into the Common Bench. And it was much doubted whether such Cerciorari were allowable; Because that Records in the Kings Bench, shall not be removed out of that Court, into any other Court: For that the Pleas here are coram Rege. And divers presidents were shewn, that such Records were by Mittimus out of the Chancery, sent into the Common Bench. viz. Hill. vicesimo primo Elizabethæ rot. 1374. In debt upon a Judgment in this Court, upon *Nul tiel Record* pleaded by Mittimus out of the Chancery, it was sent into the Common Bench, and Judgment for the Plaintiff. And Mich. vicesimo tertio & vicesimo quarto Elizabethæ rot. 2013. betwixt Leex and Scargill was such a president. And Hill. 11 Jac. rot. 3455. betwixt Palmer and Steward, Debt upon a bond to the Sheriff for appearance, he pleads, comparuit ad diem. The Plaintiff denies it, and by Mittimus out of the Chancery, it was brought into the Common Bench, and Judgment there was given. And Hill. undecimo Jacobi rot. 1715. Fylipps *versus* Mannings, such Plea and Judgment, and divers other presidents were shewn; Wherefore it seemeth, that such course is well allowable, sed adjournatur.





Termino Paschæ, anno nono Caroli Regis,
in Banco Regis.

Symms *versus* the Lady Smith. Hill. 6 Car. rot. 1066.



Covenant. For that the Defendant had covenanted, 1. That she would make a lawful surrender of such Copyhold-land, upon reasonable request, and that she would permit the Plaintiff to enjoy the said Lands and to receive the Rents quietly, without interruption. And the Plaintiff shews, That she was a Copyholder of such Lands, and alledges the custome, that she might surrender by Letter of Attorney into the hands of two Tenants out of Court: And shews, that he caused a Letter of Attorney to be made, for the said Dame Smith to Seal, to give authority to such two persons named therein, to surrender at the next Court, and tendered it unto her to Seal; And she would not seal it, nor surrender at the next Court, holden such a day, and that she received the rents of the said Lands, for such a time, and so brake her Covenant by not surrendering upon that request. The Defendant pleads, That the Plaintiff tendered unto her a Letter of Attorney to seal; and because she did not know what was therein contained, she required reasonable time to be advised by her Counsel thereupon, and the Plaintiff refused to give her any time to be advised thereon; For which cause she did not seal it: And upon this Plea the Plaintiff demurres. And being argued at the Barre by Baill for the Plaintiff, and by Beare for the Defendant. First, The Court resolved, That the breach is not well assigned, For she is by her Covenant to make surrender upon request, but is not bound to make a Letter of Attorney to make a surrender; so the breach is not assigned according to the Covenant. Secondly, It was moved, that for as much as she is to make a surrender upon reasonable request, admitting that she ought to make a Letter of Attorney, she should have reasonable time to be advised after request; for there is difference where she is to make it upon request, for there she ought to have done it presently upon the request, and shall have no time to advise with Counsel; But where she is to do it upon reasonable request, she shall have convenient time to advise thereof. But all the Court held, That there

P p 2

was

was not any difference, where it is to be done upon request, or upon reasonable request. Thirdly, It was moved, That it is a breach of the Covenant, because he did not surrender at the next Court. And that a request to make a Letter of Atturney to surrender, implies a request to make a surrender; sed non allocatur: For it ought to be an express request to make a surrender, and not an implied one; Wherefore it was ruled, That Judgment should be entred for the Defendant, unless, &c.

Lancaster *versus* Keyleigh and Steymson, and Steymson his Bayle.

2. **A**ction upon the Case. The Plaintiff recovers against Keyleigh 130*l.* damages in the Kings Bench, to which Action the said Steymson and Steymson were bayle: And the Judgment being against the principal, and after (upon a Scire facias) against the bayle Error was brought by the principal and the bayle in one Writ of Error, returnable in the Exchequer Chamber, supposing the Error to be in redditione iudicii & in adjudicatione executionis ad damnum ipsorum, &c. And hereupon Sir John Banks moved, That this Record might not be removed upon this Writ of Error; For the Bayle may not have a Writ of Error in the Exchequer Chamber by the Statute of vicesimo septimo Elizabethæ, which gives this Writ only in seven Cases mentioned therein, and in no other; For it being a new Law which gives authority only to that Court, may not be extended larger than the Statute limits. Secondly, Though the Bayle may have a Writ of Error, yet one Writ of Error lyeth not joyntly for the principal and the Bayle; because there be several Judgments given against them: and the damages against the one is not against the other; wherefore they may not joyn in a Writ of Error, no more than Tenant for life, and he in Reversion; or the Tenant and Voucher may joyn. And of this opinion was all the Court.

Pruett *versus* Drake and his Wife. Pasch. 8 Car. rot. 271.

3. **E**rror of a Judgment in the Common-Bench in Dower. The Error assigned was, Because the Writ and Declaration made demand of Dower, in a Messuage, 160 acres Terræ, 60 Prati, 100 Pasturæ, & de communia Pastur. pro omnibus averiis, cum pertinentiis, &c. The Tenant pleads, *Ne unques seisse q. Dower, &c.* and found for the Defendant; and Damages assessed, and Judgment, whereas, of Common in gros without number, a Feme is not dowable: And the damages being intirely given, and Judgment accordingly, it was therefore moved by Calthorp to be Error. Rolls for the Defendant, in the Writ of Error, agreed, That of common in gros without number, a Feme is not dowable: But he conceived, it shall not be here intended to be Common in gros, but rather appendant or Appurtenant:

purtenant : And although it was said, If it were Common Appendant or Appurtenant, it need not be demanded, but is included in the Land, cum pertinentiis, and that it is now his petitem, yet that is no cause of Abatement of the Writ ; For if he had pleaded in Abatement for that cause, it should not prejudice the Defendant ; for he might have abridged her plaint ; And after Judgment it is no cause to reverse it. And precedents were shewn in the Common Bench, Pasch. 4 Car. rot. 1066. betwixt Peckham and Wickham ; where in Dower the demand was in the same manner of Lands and Common ; And upon pleading, Demurrer being for part, and a Verdict for part, Judgment was for the Defendant. And now being debated, all the Court seriatim delibered their opinion, That as the Case is, the Common may be intended Appendant or Appurtenant, whereof Dower is demandable ; And it shall not be intended to be Common in gross without number, whereof a Feme is not dowable ; And the rather, being after Verdict, which finds, That he was seised, quod Dower, &c. And by intendment it appeared upon the Evidence, That it was such a Common as went with the Land, whereof he was dowable : And if it had been Common in gross without number, the Judge before whom the Cryal passed, would have directed it to be found against the Defendant. And therefore (it being also in case of Dower, and to affirm a Judgment) the most favourable construction shall be made : And although the words are, Et de Communia Pastura, &c. yet it shall not be intended, divided common ; but rather an enumeration of the things demanded : And the other Judgment being in the same manner upon a Demurrer, they all agreed, That it was no Error ; And therefore the Judgment was affirmed.

Preist *versus* Wood. Hil. 8 Car. rot. 181.

Ejectione firmæ of a Lease of Tythes in Roughton by Charles Baldwin, appertaining to such a Chappel. The Ejectment supposed in taking of so many loads of Tythes of Wheat and Barley, being severed from the nine parts. After Verdict upon Not guilty pleaded, it was found for the Plaintiff, and moved in arrest of Judgment by Grimston, That an Ejectione firmæ lies not of Tythes only ; But it may be of a Rectory, or of such a Chappel, and of the Tythes thereto appertaining ; so as he may be ejected of or from a thing in possession, whereof Habere facias possessionem may be, but not of Tythes only. The Court would advise. Vid. 1 & 2 Ph. & M. Dyer 116. 9 Eliz. Dy. 258. Co. lib. 11. fol. 25. 15 H. 7. 8. It being afterwards moved again, was adjudged for the Plaintiff.

Barnaby *versus* Rigalt. Mich. 8 Car. rot. 364.

Error of a Judgment in the Common Pleas in an Action of the Case upon an Assumpsit ; and declares, upon the Custome of Merchants,

Merchants, whereby, if one for wares delivered unto him or his Factor, makes a Bill of Exchange, directed to a Merchant, and the Merchant to whom it is directed accept thereof, and after refuses to pay, and this is protested before a publick Notary, That then he who delivered the Bill is bound to pay it : And alledges in fact, That the said Rigalt delivered in France such Wines of the value of 200 l. to Joh. Stile Factor of the said Barnaby, and he thereupon delivered a Bill of Exchange for the said money to J. N. who accepted thereof, and had not paid it ; Whereupon he brought his Action. The Defendant pleaded Non Assumpsit, and found against him, and Judgment for the Plaintiff. And Error assigned, Because the Action is grounded upon the Custome of Merchants, and doth not shew that the Plaintiff was a Merchant at the time of the delivery of the Bill of Exchange : But because he was named to be a Merchant in the Declaration, and the Bill is for Merchandise sold, the Court would not intend but that he was a Merchant at that time, &c. Wherefore the Judgment was affirmed.

Blunden *versus* Baugh. Hill. 7 Car. rot. 1106.

6. **E**Rror of a Judgment, in the Common Bench. Baugh brought an Ejectione firmæ of Lands in Blechingley, of the demise of Charles Earl of Nottingham, against Blunden. Upon Not guilty pleaded, a special Verdict was found, That anno tricesimo nono Elizabethæ, Charles, Lord Howard Lord Admiral, being seised of the said Land in Tayl by Indenture, covenanted, in consideration of marriage betwixt Sir William Howard his eldest Son and heir, and Elizabeth daughter and heir of the Lord St. John, to suffer a Recovery of those Lands, to the use of the said William and Elizabeth and the heirs males of the body of the said William, with divers Remainders over. That the marriage took effect, and the said William entred by the assent of his Father, and occupied at his will ; and in quarto Jacobi, by Indenture, demised that Land to Thomas Humphrys and John Humphrys, for twenty one years, rendring 115 l. rent : They enter and were possessed prout Lex postulat. And being so possessed, The said Charles, then Earl of Nottingham, and the said William then Lord Effingham, by Indenture, covenanted with Sir Robert Dormer and others (for that the said Indenture of tricesimo nono Elizabethæ was not executed for the performance of the Assurances and uses comprised therein) To levy a fine of those Lands, to the use of the said William Lord Effingham and Elizabeth, for a Joynture for the said Elizabeth, and to the heirs males of the body of the said William, The remainder over, as in the Indenture, &c. which fine was levyed accordingly, and to the uses in the said Indenture mentioned. That in nono Jacobi, the said William Lord Effingham dyed without Issue male of his body : And that John Humphrys dyed : And that in decimo quarto Jacobi, Thomas Humphrys, being

being leased or possessed prout Lex postulat, by Indenture inroll'd within six months, in consideration of a competent summe of money, bargained and sold the said Lands to Charles Lord Effingham, Son and Heir apparent to the Earl, and his heirs. Charles Earl of Nottingham dyes; Charles now Earl of Nottingham, being his Son and Heir, entred. Blunden the Defendant, by the command of the said Elizabeth, entred, and claimed it as her Joynture. And Charles now Earl of Nottingham, Son and Heir of the said Charles Earl of Nottingham the Lord Admirall, entred, and made a Lease for thre years to the Plaintiff, who entred; and the Defendant, as servant of the said Elizabeth, and by her command ousted him. And if super totam materiam, the Court should adjudge for the Plaintiff, They found for the Plaintiff; if otherwise, for the Defendant; And they found the said Elizabeth to be yet alive. After arguments at the Barre in the Common Bench, and at the Bench, it was, by the opinion of Richardson chief Justice, Hutton, and Vernon, adjudged for the Plaintiff, against the opinion of Harvey Justice, who argued strongly for the Defendant. And hereupon a Writ of Error was brought, and the Error assigned only in the matter of Law. And it was divers times very well argued at the Barre by Littleton Recorder of London, and Serjeant Brampton, for the Defendant in the Writ of Error; and by Calthorp, and Serjeant Henden, for the Plaintiff; and afterward by all the Justices of the Kings Bench seriatim: And Jones, Berkley, and my self, held, That the Judgment was erroneous. The main question was, Whether by any of these acts there be a Disseisin committed to Charles Earl of Nottingham, nolens, volens? And if there be a Disseisin, Who should be the Disseisor and Tenant to the Freehold? And to the first Jones, Berkley, and my self held, That the Law will not impute nor construe it to be a Disseisin, unless at the election of Charles Earl of Nottingham, when as none of the parties intended it to be a Disseisin, nor to ouste him of the possession: For as Cok. Lit. 153. defines, A Disseisin is when one enters, intending to usurp the Possession, and to ouste another of his Freehold; And therefore Quærendum est à Judice, quo animo hoc fecerit, why he entred and intruded; And it is at the election of him to whom the wrong is done, if he will allow him to be a Disseisor, or himself out of possession. And therefore if one receiveth my rent, It is at my election, if I will charge him with a Disseisin, by bringing an Assise or other Action, or have an Account. And if an Infant makes a Lease for years rendring rent, and the Lease enter, It is at the election of the Infant to charge him in Assise, or to bring Debt for the rent, or to accept the rent at his full age, as 7 Ed. 4. 6. and other books be. So it is if one enters, claiming as Gardian in Socage, or by Nurture, where he is not, It is at the election of the Infant to bring an Assise, or to charge him as Gardian, thereby admitting him to be in, without wrong, as 49 Ed. 3. 10. 40 Ed. 3. Accompt, 35 & 33 H. 6. 2. and many other books be. And Tenant at will is at the will of both parties; and the will shall not be determined

mined by every act. Vide 38 H. 8. 62. Keleway 20 H. 7. 65. So where a *Feme* Lessee at will takes Husband, or a *Feme* makes a Lease at will, and takes husband; Although the *Feme* hath put her will in her Husband, yet it shall not be said a determination, without the election of the Lessor or Husband to the contrary, 38 H. 8. Dy. 62. Lessee surrenders, and yet occupies, he is no Disseisor, but at the pleasure of the Lessor, 11. Affise 6 where a man makes a Feoffment and continues in possession, And the common Case where a Copyholder makes a Lease for years, not warranted by the custom, yet it is no Disseisin; and the Law accounts it a good Lease betwixt Lessor and Lessee and all strangers: And to that purpose was cited Hillary 18 Jac. rot. 792. betwixt Streat and Virrall. Ejectione firmæ brought upon such a Lease: And, upon special Verdict, adjudged for the Plaintiff, That it is a good Lease against all but the Lord. And they all relied upon another Judgment in the point, Hill. 18 Jac. rot. 1230. betwixt Powsley and B. where one Carr bargains and sells Land, by Indenture inroll'd, to Bertram, upon condition, That upon the payment of three hundred pounds at the end of three years, it should be void: And that in the interim the Bargainor should not meddle with the profits of the Land, The Bargainor occupies, and makes a Lease for five years, and at the day doth not pay the money; The Bargainor doth not enter, but (the Bargainor occupying it) he deviseth that Land. And it was adjudged a good devise; But if he had been disseised, the devise had been void. And here it shall not be intended, That the son intended to disseise his father, but that the Lease was made by the assent of the father: Also the party to whom the Lease is made, doth not claim any Franchhold, but to have the Lease only, and to pay his rent, and pay the Rent accordingly; so there was no intent in any of the parties to make a Disseisin, Then the Law shall not construe it to be a Disseisin partibus invitis. And hereby it follows, That the Franchhold remains in the Earl of Nottingham until the fine leysed by him and his son; and so the uses well raised, and the Joynture well assured. Secondly, Admitting there were a Disseisin committed by these acts, the question is, Who is Disseisor and Tenant of the Franchhold? And Jones, Berkley, and my self held, That William Lord Effingham who made the Lease, is the Disseisor and Tenant. For when Tenant at will takes upon him to make a Lease for years, which is a greater Estate than he may make, That act is a Disseisin; and by this Lease for years made, and the Lessee entering and paying the rent unto him, and he accepting thereof, he is in as Lessee, and the Lessor is the Disseisor, and hath the Reversion expectant upon this Lease. And this Lease betwixt them, is an interest derived out of the Inheritance, gained by this Disseisin. For if a Lessee for years make a Feoffment, although it be a Disseisin to the Lessor, yet it is a good Feoffment betwixt them de facto, though not de jure, and the Feoffee is in the per, as 4 Ed. 2. brev. 403. 19 Ed. 2. brev. 770. 15 H. 3. brev. 878. Fitzh. Nat. Brev. 201. 8 H. 7. 6. per Fineux Temp.

Temp. Ed. 1. Counterplee de Voucher 126. & Cok. Lit. 367. And Warranty may be annexed to such an estate, upon which he may Touch, as 50 Ed. 3. 12. And if such Lessee for years, or at will, makes a gift in tale, or a Lease for life, that creates a good Lease or a good gift in tale amongst themselves and all others, besides the first Lessor; and as to him they are both Disseisors, as it appears by the books 14 Ed. 4. 6. 18 Ed. 3. Issue 36. 7 Ed. 3. Issue 7. 14 Ed. 3. *Fessments & Fays* 67. So it is where a Lessee at will makes a Lease for years, (especially it being by Indenture) it is a good Lease between them, and Debt lies for the Rent; and the Lessee shall not avoid it but by an ouster by the first Lessor, as 21 H. 7. 26. is. And Jones cited, That 42 Eliz. between Spark and Spark, it was so adjudged, Where Lessee at will made a Lease for years, and he being ousted by a Stranger, brought an Ejectione firmæ, and recovered. And Hill. 16 Jac. rot. 792. between Sreat and Virrall, the Case supra. And so it was resolved in this Court 28 Eliz. That an Ejectione firmæ lies upon a Lease made by a Coppyholder not warranted by the Custome against any Stranger; and the book of 12 Ed. 4. 13. is directly to the point. So here when Lessee for years enters according to the Lease and pays his Rent, the Freehold between them shall be in Will. Lord Effingham, who made the Lease, and not in Humphrys who is only Lessee; and then the fine lewyed by the Earl of Nottingham and his son conveys well the Freehold, and the uses are well raised upon this fine, and the Joynture well settled; and then during her life the Earl of Nottingham hath no title to make a Lease; wherefore the Judgment ought to be reversed; and so much the rather for the great mischief which would ensue, if one who hath a Tenant at will, who makes a Lease for a small time; and the first Lessor, not knowing thereof, levies a fine for a Joynture for his wife, or to perform his will, or to other uses, &c. if he should be adjudged disseised, and as a Disseisor to levy fine which should tend to the benefit of the Lessee for years, and he adjudged a Disseisor against his intent or knowledge, as in this case is pretended, many should lose their Inheritances. In many Manors are divers Tenants at will, where the Father is Tenant at will, and after him the son enters and occupies at will of the Lord, and is so reputed, and the Lord allows them, and never accounted them as Disseisors; if such Tenants at will make under-leases for a year, or for half a year, if the Lords of those Manors levy fines of those Manors, and this should tend to the benefit of the Under-lessees, who should be reputed to be Disseisors without the intent of any of the parties, Many Lords should hereby be disinherited: Whereupon they concluded, That Humphrys the Lessee was neither Disseisor nor Tenant, but only Will. Lord Effingham, and he is the Disseisor and Tenant; and the fine lewyed by Charles Earl of Nottingham, and William Lord Effingham his son, is a good fine, and the uses well raised, whereby Elizabeth the wife of the said William Lord Effingham hath good title, and the Defendant under her; wherefore the Judgment ought to be reversed.

reversed. But Richardson chief Justice argued to the contrary, and continued his former opinion, That Humphrys is the Disseisor, and was Tenant of the Freehold, at the time of the fine lepyed. And then the fine by the Earl of Nottingham (being a Disseisor, and his Son William Lord Effingham adjutor to the Disseisin) shall inure to barre the right of the Earl of Nottingham, and for the benefit of the said Humphrys, according to the opinion in Cok. lib. 2. fol. 56. in Bucklers Case; and that he is a Disseisor to the Earl of Nottingham, not at his pleasure, but de necessario; For, A Disseisin is a tortious outring of any one from his Seisin: And here this taking of the Lease by Humphrys from the Lord Effingham Tenant at will, and his entring by colour of the said Lease, is a Disseisin. And here is an Entry usurpando jus alienum without consent of the Earl of Nottingham; and as Tenant at will may not grant his Estate, as 27 H. 6. 3. is, no more may he make an estate; and the Earl of Nottingham hath no election to say it is no Disseisin. But he agreed to the Case, Where an Infant makes a Lease for years, reserving rent, and the Lessee enters, the Infant hath election to allow him to be his Tenant, or to be a Disseisor, which is most for his advantage. So where one enters and claims as Gardian and occupier, the Infant may allow him either Disseisor or Accomptant, which shall be for his best advantage. Secondly he held, That Humphrys is the sole Disseisor and Tenant of the Freehold; For he, by his entry, did the sole act which made the Disseisin; for the Lease for years is merely a void contract: And when one enters by colour of a void conveyance, he is the Disseisor, as in Crofts and Howells Case in Plowd. So. 21 Ed. 3. 4. and 45. where a Gardian assigned Dower to a *Feme* who is not dowable, and she enters, by her entry she is a Disseiseress, 24 Ed. 3. 43. If one enters by colour of a void extent, it is at the peril of him who enters and takes the profits, to see by what right he enters. And he denyed that the making of a Lease for years, is either an express or implied command to enter or make a Disseisin. And he denyed that the making of a Lease for years had gained the Reversion to the Lessor. But if Lessee for years, or at will, makes a Lease for life, or a gift in tale, he, by making livery, transfers the Freehold, and gains to himself the Inheritance, but by a nude and void contract he cannot gain the Reversion: Whereupon he concluded, That Humphrys is the Disseisor and Tenant, and that the fine inures to the benefit of Humphrys, and not to the limitation of the uses in the Indenture, Because none of the parties had any thing in the Land at the time of the fine lepyed; and that the Judgment ought to be affirmed. But afterwards, for the reasons of us three, the Judgment was reversed. Note. Sir Robert Heath, chief Justice of the Common Pleas, and Justice Crawley, Baron Denham, and Baron Trevor, agreed with this Judgment in the Kings Bench, and conceived, That it would be very mischievous if it should be adjudged otherwise. But Sir Humphry Davenport seemed to doubt, whether the Lessee for years ought not strictly to be taken for the Disseisor and Tenant.

Blizard *versus* Barns. Hill. 8 Car. rot. 816.

Action, for that falsè & malitiosè he spake of him these words, 7. That the Plaintiff committed felony, and procured him to be arrested for felony, and to be imprisoned for three dayes. The Defendant pleads Not guilty, and found against him generally, and damages to twenty shillings. And it was moved, that he might have no more costs than damages, the damages being under forty shillings, upon the Statute of vicesimo primo Jacobi: But because there was a president shewn quito Caroli, betwixt Edwards and Topfall in Action for words, and for falsly and maliciously procuring him to be indicted of felony: And upon Not guilty pleaded and found against him, and damages taxed but at forty shillings; yet because the Action was not for words only, but for other wrong whereof he is found guilty, he had full costs awarded him, It was resolved here to be out of the Statute.

The Earl of Newport *versus* Sir Henry Mildmay.

Mich. 6 Car. rot. 439.

Error, to reverse a Judgment in a Writ of Entry for the Baron of Wansted, against the Earl of Newport, where he appeared by his Gardians, the Earl of Southampton and others; wherein they vouched the common Vouchèr, and Judgment given upon his default after appearance; and the Error assigned, for that Judgment is given by default, he being an Infant. And it being argued at the Barre by Sir John Banks and others for the Plaintiff in the Writ of Error, and by Noy the Kings Atturney, and others, for the Defendant, the Court resolved, That it was not Error; For the Judgment is not given upon default of the Infant, but upon departure of the Vouchee in despite of the Court: And the Court is trusted, that they will not admit a Gardian, but such as shall answer to the Infant for his loss, if he hath any; and it is intended to be for his advantage: And common recoveries are common assurances of the Realm, and ought not to be shaken: Nor is there any pretence for an Infant, who appears by his Gardian, more than for any other person at full age: And it appears by 9 Ed. 4. 34. and by many presidents shewn in the time of Hen. 7. Hen. 8. Ed. 6. Q. M. and Q. Eliz. and Kings James, and in the time of this King, that such recoveries have been suffered from time to time. And every president is a Judgment, not sub silentio, but in the Conscience of the Court; and it would be inconvenient to avoid so many recoveries; and it stands with Law, that such recoveries may be: Therefore without any open argument, the Judgment was affirmed, notwithstanding the opinion of Cok. lib. 10. fol. 43. Mary Portingtons Case to the contrary.

Sir George Symonds *versus* Sir Michael Green and Will. Green
his Son in Chancery.

9. **T**He Lord Keeper, being assisted with Justice *Hutton* and Justice *Jones* in former hearings, and by *me* in this last hearing, it was decreed, That whereas Sir *William Green* was seised in Fee of the Manors of *Great-Milton* and *Little-Milton*, and the reputed Manors of *Great-Chilworth* and *Little-Chilworth* in the Parish of *Milton*, and of divers Lands in *Chilworth*, purchased 30 *Eliz.* of Sir *Michael Dormer*, and of other Lands purchased *primo Jacobi*, which one *Ives* occupied together until *tertio Jacobi*: And then in consideration of the Marriage of Sir *Michael Green* his son, with one *Millesent Reade*, with whom he had 4500 li. covenants to stand seised of the said Manors of *Great-Milton* and *Little-Milton*, and of divers particular Closses, by name in *Chilworth*, and of all his other Lands, Tenements, and Hereditament to the said Manors appertaining, or used and occupied with them, to the uses following, *viz.* of the Manor and premises, to the use of himself for life, without impeachment of waste; And after, of such a Manor and some of the Closses by name, To the use of *Anne* his wife, for her Joynture; And of other the particular Closses before mentioned, To the use of *Millesent* for her life, for her Joynture; And after the decease of Sir *William*, *Anne*, and *Millesent*, To the use of the said Sir *Michael Green* and the Heirs Males of his body, with a remainder to his right Heirs: Afterward Sir *Michael Green* and Sir *William Green* joyned in a bargain and sale of the Manors of *Milton* and *Chilworth*, and all the Lands thereto appertaining, or reputed as part of the same, or within the same; And they levy a fine by the name of *The Manors and 10 Messuages, 600 acres terra, 200 prati, & 700 pastura*, which quantity comprised as well the Freehold Lands as the Manors. The question was, Whether the parcels of Land divided from the Manor by the Intail, and the Freehold Land lately purchased, should pass by this Mortgage? And they all resolved, That the Lands intayled, which were parcel of the Manor, shall not be said to be severed from the Manor: For the Freehold never being severed, but remaining intire in Sir *William Green*, during his life, shall pass as parcel of the Manor at the time of the Mortgage; And that the Freehold bought in and occupied with the Manor, although it was but for two years before the Mortgage, may pass, being said and reputed parcel, and by that name: And the fine is well enough guided by the Indenture for the Manors and for the Freehold purchased, although they were not in *rei veritate* parcel of the Manor; And a little time is sufficient for the gaining a Reputation: Wherefore it was decreed, That Sir *George Symons* should enjoy the Manor and the Freehold purchased: And that Sir *Michael Green* and his son should make further assurance at the cost of Sir *George Symons*: And that this Indenture is a sufficient declaration of the uses of the fine, as it was declared by all the said Justices and by the Lord Keeper himself.

Johns

Johns *versus* Stratford. Mich. 8 Car. rot. 96.

DEbt, upon an Obligation of 200 li. upon condition to come to 10. his lodging, and to go with him to the Counsel at Wales. The Defendant pleaded the Statute of vicesimo tertio Henrici sexti; and that the Plaintiff is a Serjeant at Arms, attending upon the President and Counsel of the Marches of Wales, and took that Bond under colour of an Attachment out of the said Court, and so void. And hereupon the Plaintiff demurred. And it was moved by Henden Serjeant, That he was not any Officer intended within that Statute, which extends only to Sheriffs and their Bayliffs and other Ministers and Guardians of Prisons; And Serjeants at Armes are not any of these Officers, but immediate to the Counsel of the Marches of Wales: Also the said Counsel is a Court erected of late time and since the said Statute, and cannot be intended within the Statute. And of that opinion the Court seemed to be, but did not resolve therein. But because it is shewn, That the Plaintiff who made the Arrest out of the Marches, that is to say, in London, which is out of the Jurisdiction, &c. Then clearly this Obligation is out of the intent of this Statute: Therefore rule was given, that Judgment should be entered for the Plaintiff, &c.

Starre *versus* Buckhold.

A Prohibition was granted upon the motion of Grimston, to stay 11. a suit in the Arches for these words, Thou art a Drunkard, A drunken fellow, A base idle drunken fellow. Because these words tend to a temporal offence, and are punishable as a temporal offence, and not punishable in the Ecclesiastical Courts.

Termino



Termino Trinitatis, anno nono *Caroli Regis*,
in Banco Regis.

Thomas Gwin and Briget his Wife *versus* David Gwin.
Hill. 5 Car. rot. 295.

- I. **E**Rror of a Judgment in the grand Sessions in the County of Brecknock, by David Gwin, in a Quod ei deforciat, protestando prosequi Breve illud in forma & natura Brevis, de recto ad Communem Legem, secundum formam Statuti *Rutland*, de tribus messuagiis, 200 acris terræ, 100 acr. prati, 60 acr. pasturæ, & 100 acr. bosci, & medietatem molendini in *Llannybagell*, ut jus & hæreditatem suam: Et unde dicit quod ipsemet fuit seiscitus de Tenementis prædictis & medietate prædicti molendini in dominico suo ut de feodo & jure, &c. Et quod tale sit jus suum, offert, &c. And the said Thomas and Briget ven. & defend. jus prædict. *David* & seisciam, &c. And *Imparle, &c.* At the next Sessions the Plaintiff Counts ut antea verbatim: And the Defendant Briget pleads, That she majus jus habet tenendi 100 acras terræ, 30 acras prati, & 40 acras pasturæ, parcel. tenementorum modo petit. pro termino vitæ suæ, Reversionem inde præfato *Thoma* & hæredibus suis, quam prædictus *David* habet ad tenendum Tenementa prædicta, &c. Et de hoc ponit se super patriam; & prædictus *David* similiter. Et prædictus *Thomas* dicit, Quod ipse habet majus jus tenendi tenementa prædicta & medietatem prædicti molendini, cum pertinentiis, ut illa tenet, quam prædictus *David*, &c. Et de hoc ponit, &c. Et prædictus *David* similiter. And the Jury found both Issues for the Demandant; and Judgment entred, Quod Recuperet versus præfatos *Thomam* & *Brigettam* prædicta Tenementa & medietatem prædicti molendini cum pertinentiis tenend. sibi & hæredibus suis quiete de præfatis *Thoma* & *Brigetta* & hæredibus suis in perpetuum, &c. And upon this Judgment a Writ of Error was brought: And because the Writ of Error supposed, that the proceedings were in Curia nostra; where it appears by the Record, that the beginning thereof was in 22 Jac. therefore the Writ of Error was abated, and a new Writ of Error brought coram nobis resident. And upon it divers Errors were assigned by Mr. Prothorough: First, That the Writ being a Quod ei deforciat, the protestation being prosequi in natura Brevis de recto, he ought to shew, what Writ of right; for there be divers kinds of Writs of right: But that was disallowed. Secondly, That the defence is not well made; For in a Writ of Right there ought

to have been a double defence, viz. the Plaintiffs right, and to maintain his own right. Thirdly, That the Defendants joining in defence, ought not to have severed in their Pleas. Fourthly, That the Plaintiff having admitted them to plead several Pleas, and taking several Issues upon their several Pleas, hath admitted that they are several Tenants, and so hath abated his own Writ. Fifthly, Because Briget pleads as Tenant for life for part of the Tenements, alledging the Reversion to be in Thomas, and for the residue pleads nothing, nor claims any estate, yet Judgment is given against Thomas and Briget and their Heirs, for all the Tenements: And so a final Judgment against the *Feme* for all, where she pleads but to part; and against her heirs, where she claims but for life. And this was held a manifest Error: Wherefore for this cause principally, the Judgment was reversed.

The King *versus* Sherington Talbot.

IN a Quo warranto he claims liberty of free Warren in Rydge and two other towns in the Forest of S. The Defendant disclaims 2. to have such liberties in the said two Villages and in the Forest. But quoad his claim of Warren in Rydge, he pleads, That he is seised in fee of the Manor of Ridge, whereof the said Village of Ridge is parcel; and that he and all his Ancestors, and all whose estate he hath in the said Manor, hath had, time whereof, &c. liberty of free Warren in all the said Manor, and within the Demeasns thereof; Ita quod nullus fugabit any game of Warren within the said Manor and Demeasns thereof sine licentia of the said Sherington Talbot. Issue was taken, That he and all those whose estate, &c. had not free Warren within the said Manor and Demeasns thereof, And found for the Defendant. And now Noy, Attorney General, moved in arrest of Judgment, first, That the Plea is not good to prescribe to have Warren in the said Manor and Demeasns of the Manor: For although he may prescribe to have it in his own demesns, yet he cannot prescribe to have it in the Lands of others, his Freeholders, nor ought he to prescribe to have it pertaining to his Manor: And for that purpose he cited 5. Ass. plac. That one ought not prescribe to have Turbary in anothers soyle as appertaining to his Manor. Second Exception, Because it is by Prescription, Ita quod nullus sine licentia Sherington Talbot, which is impossible to be, for the time whereof, &c. But to these it was answered by Rolls, That a Prescription to have free warren in his Manor is good, as well in the Lands of the Freeholders, as in the Demeasns: For being by Prescription, it is intended, That this liberty was before the creation of the Freeholders, whose estate was extracted out of the Demeasns of the Manor, after the beginning of this Prescription. And as to the second, That the allegation thereof is not of necessity, and doth not vitiate the Prescription. Thirdly, It was moved by Grimston in arrest of Judgment, that the

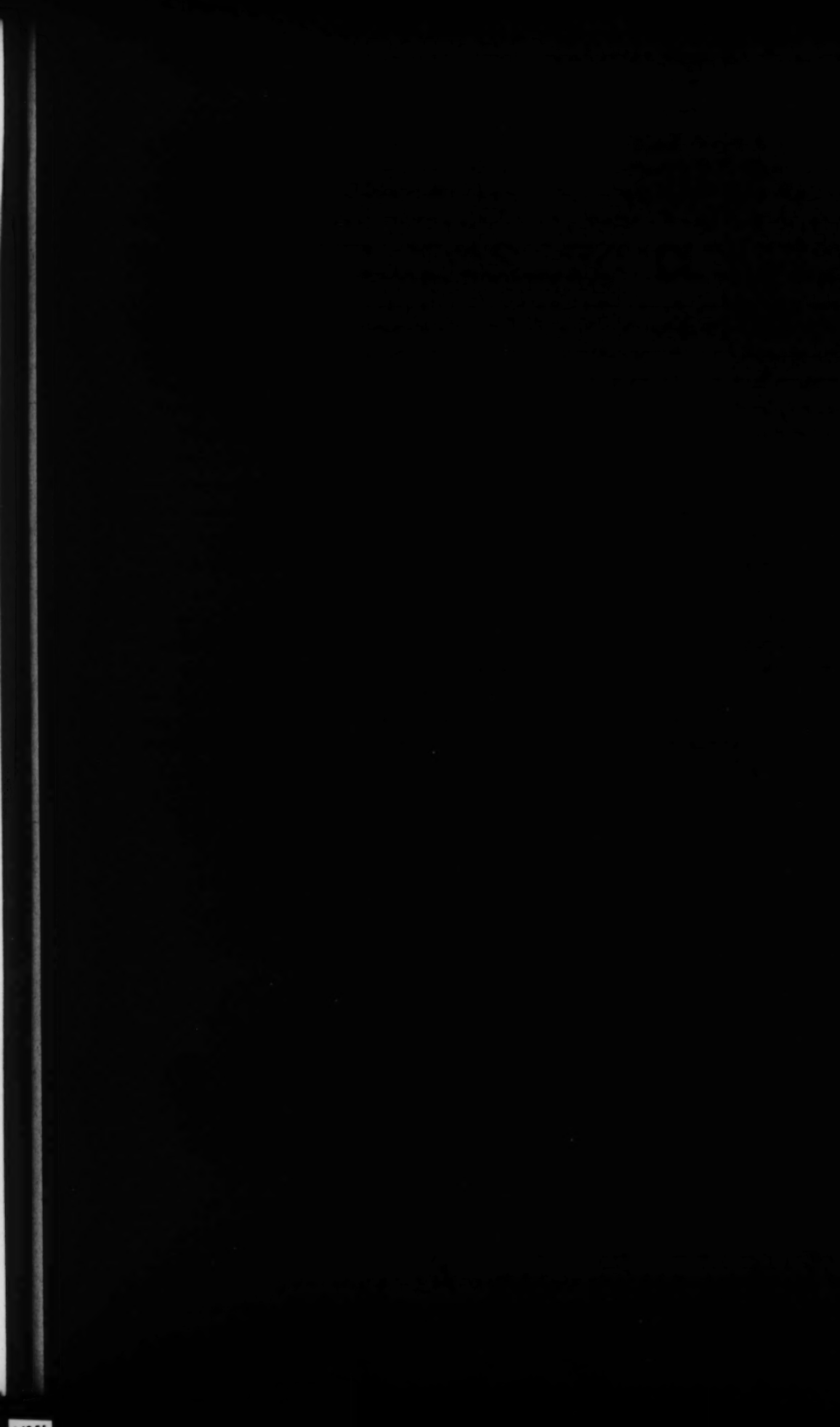
the Tryal was by Venire facias awarded from Ridge, where it ought to have been of the Banco; for Ridge is alledged to be but parcel of the Banco: And for this cause all the Court held it to be a Mistrial, and not aided by any of the Statutes; and that it ought to be of the Banco, which is the greater and more notorious; wherefore a Venire facias de novo was awarded. And it was moved, Whether that were within the Statutes of Jeofayls, because it concerns the King; and the Statutes have an express Proviso, That they shall not extend to Appeals or Endiements or Informations upon penal Laws, and cited some of them; But not any Quo warranto? And Richardson, Jones, and Berkley held, that the Statutes did not extend to this Case, nor to Informations of Intrusion, for the King is not bound unless he be named. But Noy said, peradventure it should be otherwise in case of a Quare impedit, where the suit is betwixt the party and the King.

Townley versus Chalenor, in the Chancery.

3. **U**Pon a Bill of review to reverse a Decree there, the Lord Keeper required the assistance of Justice Jones (by whom the Decree was made) and of Justice Hutton, Justice Berkley, Justice Crawley and of my self, where the Case was, That Thomas Foster and Townley being Assignees in trust of a Lease, to the benefit of Chaloner an Infant, Thomas Foster took all the profits, and was in arrear upon accompt 1500l. and being unable to satisfy, the question was, Whether Townley agreeing to this Assignment by sealing the Counterpart thereof, and joyning with Foster in acquittances of the rents for a year and half (but never more medled) shall be charged only for that wherein he had joyned in the Acquittances, or for all the residue? And it was resolved, That Townley, being but a party intrusted, shall not be answerable for more than came to his hands; for it was the default of him who put them in trust, to repose trust in one who was not able to pay; and he being the party trusted, as well as Townley, Townley shall not be compellable to satisfy his defect: Wherefore it was resolved, That that part of the Decree whereby he was charged to pay what Thomas Foster could not, ought to be reversed.

Eyres versus Taunton. Cujus principium ante pag. 295.

4. **I**T was moved again by Mallet for the Defendant, in stay of Judgment. Whereas the Plaintiff the last Term procured a new Scire facias out of this Court directed to the Sheriff of Gloucester, to summon the heir of Cawley, because he had not made any mention in his former return of the heir; And thereupon this Writ issued out of the Court, Ex officio Curiae ad informandum Curiam. And the Sheriff had returned, That Cawley had not any Lands in his Bayliwick which descended to his heir, nor any heir within his Bayliwick, &c. That yet no Judgment ought to be given, first,
Because,





Because this Scire facias ought not to have been awarded to the Sheriff of Gloucester; But upon a Testatum, that the first Scire facias was awarded to the Sheriff of Middlesex where the Recognisance was first acknowledged; For being grounded upon a Record, he ought first to sue the Scire facias there; And upon return That there is not any heir there, Then to have this in another County; And he cited the book of Entries, fol. 500. and 2 Ed. 3. 20. sed non allocatur. For true it is, the first Scire facias upon a Recognisance to have execution, ought to be in the County where it was acknowledged; But when it is sued there, and the party returned dead, it may be sued against the heir or *Terr-tenant* in any County where the party surmiserh he hath Land: Also this Scire facias is ex officio Curiae, and in favour of the party, and there is no reason he should take exceptions to it. The second exception was taken to the return of the writ; For it is returned, That there is not any heir within his Bayliwick, where it ought to have been, That there is not any *Terr-tenant*; And that there is not any heir generally; sed non allocatur: For the return upon the first Scire facias shews what Lands he had; And it shall not be intended there be more Lands when no heir is found there; and the Sheriff hath no authority to inquire into other Counties. The third exception, That the return upon the second Scire facias in Chancery, whereupon the plea is pleaded and issue joyned, was insufficient for the reasons before alledged, and the tryal ill. But now all the Court agreed, Although the return had been better, if it had found who was heir, and that he was warned, or that there was not any heir in the said County, yet it is well enough: For as 17 Ed. 2. tit. Execution 139. Anciently the Scire facias was only against the *Terr-tenant*, and the heir was not charged in the Scire facias but as *Terr-tenant*; and if the return be not good or formal, yet it is aided by the Statutes of Jeofays; And the mis-return, or insufficient return of the Sheriff also, quoad the heir (because he is not named in the return) is but a discontinuance, which is aided by the Statutes of Jeofays: Wherefore Richardson, Jones, and Berkley agreed, That there was not any cause after Verdict to stay Judgment; whereto I assented. The fourth Exception, That it was not a good Tryal by Nisi prius; For issue being joyned in Chancery, and the Record delivered into the Kings Bench to be tryed, it ought there to have been tryed, and not by Nisi prius. But all the Court was against it: For issue being joyned betwixt party and party, may well be tryed by Nisi prius out of this Court, and so are many precedents: Wherefore Judgment was given for the Plaintiff.

Randall *versus* Scory. Pasch. 8 Car. rot. 422.

ERror of a Judgment in the Common Bench, in a Replevin, 5.
Where the Defendant Avows for an Hariot, upon a Lease made by Indenture to Robert Chichester, his Executors and A-
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signes, for ninety nine years, if the said Robert Chichester, John Bellun, and James Bellun, or any of them, shall so long live, rendring rent, and rendring and paying after the death of the said Robert Chichester, his Executors, and Assignes, his or their best Beast for an Hariot, or fifty shillings, at the election of the Lessor, his Heirs, or Assignes; and because the said Robert Chichester assigned this Lease to the Plaintiff, and after dyed, for non-payment of the Hariot after the death of the said Robert, he distrained, and Avowes, &c. The Plaintiff demands Oyer of the Indenture, which was entered in hac verba ut prius. But the clause for the Hariot was, Rendring and paying to the Lessor, his Heirs, and Assignes, after the death of the said Robert Chichester, John Bellun, and James Bellun, and every of them, his or their best Beast in the name of an Hariot, or fifty shillings, &c. ut antea. And for this variance the Plaintiff demurres, and Judgment given for the Plaintiff, and Error thereof brought. The Error assigned was in point of Law. Rolls for the Plaintiff in the Writ of Error moved, That this is no variance, and that the Avowry is good; for the Lease being to him, his Executors and Assignes, the reservation of the Hariot, in construction of Law, is the reservation of him, his Executors, and Assignes, viz. after the death of him, his Executors, or Assignes, his or their best beast; for it cannot be construed the best beast of Bellun and Bellun, for they are strangers to the Dæd, and have nothing to do therewith. But all the Court held, That there is a plain and manifest variance; for although the best beast of Bellun and Bellun cannot be construed to be meant thereby, yet the reservation is not, That it shall be paid after the death of the Executors or Assignes, But only after the death of Chichester, Bellun, and Bellun; so as they are the parties after whose death the limitation of the Hariots are to be paid; and not after the death of the Executors or Assignes: Wherefore the Avowry was ill, and the Judgment affirmed.

Fenns Case.

6. FENN, a Fishmonger of London, was indicted at Newgate Sessions, for that he ingrossed divers kinds of fish, viz. Smelts, Whitings, &c. ea intentione ad revenden. contra form. Statuti. Unto this he pleaded Not guilty, and the Enditement was removed hither by Cerciorari. Henden Serjeant moved in arrest of Judgment, That by the express words of the Act of 5 Ed. 6. Fishmongers, and Butchers, &c. are not said to be Ingrossers, nor within the Statute for Ingrossing, if they buy only things belonging to their Trades for it is not the intent of the Statute to restrain them, it being necessary, & for the benefit of the Subjects, that they should buy such things. But the Court held, That although they be not within the Statute for Ingrossing, yet if they Regrate and sell at unreasonable prices, they are expressly within it; And he is indicted, That he bought ea intentione ad revendendum contra formam Statuti, and is found guilty; So

So it shall be intended that he ingrossed and did not sell at reasonable prices; and if he ingrossed and sold at reasonable prices, it ought to have been shewn to the Jury upon the evidence, as all the Court agreed, there being a Proviso contained in the Act, That one may take advantage by giving in evidence without formal pleading thereof. And for as much as he is here found guilty, it shall be intended, that he ingrossed contra formam Statuti; Wherefore Rule was given, That Judgment should be for the King against the Defendant, unless other matter were shewn to the contrary upon the Monday following; at which day Grimston moved, That the Tryal was ill, because it was tryed at the same Sessions that he was indicted, which ought not to have been, but to have had a Venire facias, returnable at the next Sessions, and he relied upon 22 Ed. 4. corone 44. sed non allocatur: For it is the usual and common course to try it at the same time the party is indicted, especially as this case is, being at the Gaol-delivery and the party in prison. Vide 9 H. 8. Kelloway 159. That Tryal before Justices of Gaol-delivery may be the same day. Thirdly, he shewed that the entry is, That the Defendant pleaded Not guilty; Et de hoc ponit, &c. Et Johannes Michael qui pro Rege sequitur similiter, &c. And it doth not appear by what authority he joyned that Issue; for the Kings Attorney, or one that is in loco suo, ought to have joyned; sed non allocatur: For the said John Michael is the Clerk of the Peace in London, and he is an Officer known to the said Court where the Indictment was taken, and it needs not to be so mentioned in the Record; and the Court here knows it well enough: Wherefore it was adjudged accordingly for the King.

Porter *versus* Hutchman. Ante pag. 286.

ERror of a Judgment in the Common Bench, in Action upon the 7. Case in nature of a conspiracy. The Error assigned was, Because in the Declaration it is supposed that he procured him to be indicted, and to be imprisoned until he was legitimo modo acquiescens, and doth not say (inde:) And for this cause Ward Serjeant moved, That it was Error; for it was a word of substance, and the cause whereby he entitles himself to the Action; and he said, that this Judgment passed sub silentio in the Common Bench. And that in two other such Actions brought by the same party against two others, being moved in arrest of Judgment, after Verdict it was adjudged for the Defendant. And a Record was shewn in this Court Hillar. 41 Eliz. rot. 1099. Prickets Case. Where after Verdict for the Plaintiff, this exception was moved in arrest of Judgment, and it appears upon the Roll, that no Judgment was given: And Richardson chief Justice said, that he was of Counsel with the Defendant, and for this cause only the Judgment was stayed. But Bullstrode for the Defendant shewed, That Pasch. 7 Jac. rot. 407. betwixt Bell and Gamble in the like Action upon the Case,

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where

where this word (*inde*) was omitted and exception taken for that cause; yet after divers motions in stay of Judgment, and divers continuances, Judgment was given for the Plaintiff. And of this opinion were Jones and Berkley, that the Judgment should be affirmed, Because it shall not be intended, but that he was acquietatus *inde*, and not of any other matter; and the *presidents* are both ways, and in the *Writ* of conspiracy *inde* is omitted; and by the same reason in Action upon the Case, the omission of *inde* is no cause to avoid the Judgment. But Richardson chief Justice and my self much doubted thereof, by reason of those two last Judgments, and the Case of Prickett, and conceived, That the Declaration was ill for this omission; For if he were not acquietatus *inde*, it is clear an Action would not lie: And therefore, being the material clause which maintains the Action, the omission thereof is fatal; For A Declaration shall not be aided by intendment, in the point of the Action. And in the greater part of the *presidents* in print, the word *inde* is in the Declaration. Et adjournatur. Residuum postea, pag. 419.

8. **E**rror of a Judgment in Coventry, in an Information upon the Statute of quinto Elizabethæ, for exercising the Trade of an Ironmonger, not being Apprentice. After Verdict and Judgment there for the Plaintiff, the first Error assigned by Grimston was, Because by the Statute of vicesimo primo Jacobi, it is appointed, That every common Informer shall be sworn before his Information be received, That the fact was within the year before the Information exhibited, and within the same County where it is exhibited; And it doth not appear here that it was done so in this Case; sed non allocatur: For it is no parcel of the Record, but is only a direction to the Officers, that none shall be received, unless he be first sworn. The second, Because Informers cannot sue upon that Statute to have the moiety; for by the express words in the Statute, the forfeiture is given to the Corporation, for the benefit of the Corporation, for relief of the Poor, and for other uses of the Corporation; sed non allocatur: For though that Statute gives one moiety to the Informer and the other moiety to the King, except in Corporate Towns, to whom such forfeitures are granted, it is to be understood, and so hath always been expounded, That in that Case the forfeiture given to the King belongs to the Corporation; And the Informer is to have his part still: Whereupon Judgment was affirmed.

Parker *versus* Taylor. Mich. 8 Car. rot. 366.

9. **E**rror of a Judgment in Beverley Court, in Debt. Where the Plaintiff declares in Debt of 20 li. viz. 16 li. upon an Obligation and 4 li. upon a Mutuatus. The Defendant pleaded quoad the 4 li. Non debet, & de hoc ponit se super Patriam & prædictus querens similiter. Et quoad the other, he demands Oyer of the Obligation

tion and Condition, which was read to be upon condition to pay eight pound at a day, &c. and he pleads payment at the day, Et de hoc ponit, &c. and the Plaintiff similiter, and Verdict for the Plaintiff quoad the Bond; and quoad the other for the Defendant, and Judgment for the Plaintiff; and the Error assigned was, That here is not any Issue; For the Defendant ought to have pleaded quod solvit, & hoc paratus est verificare, and the Plaintiff ought to have replied non solvit, & hoc petit, &c. So there had been an affirmative and a negative; but as it is here, there is no Issue at all, and it is not aided by any Statute; and therefore it was prayed, That the Judgment might be reversed: But all the Court held, for as much as the Defendant pleads Payment & de hoc, &c. and the Plaintiff joyns with him, That the Jury shall enquire whether he hath paid, and the Jury finding, that he hath not paid, it is good enough, and aided by the Statute of Jeofayles; Wherefore the Judgment was affirmed.

Leycroft *versus* Dunker. Pasch. 9 Car. rot. 152.

Action for words. Whereas the Plaintiff for twenty years ^{10.} had used the Trade of a Merchant, and yet useth the same; and in the sixteenth year of King James used the said Trade, and went to Hamborow, and there used it until 22 Jacobi, and then returned into England, and used the Trade of a Merchant: The Defendant to scandalize him in his Profession spake these words of the Plaintiff the first of October anno 8 Car. He came a broken Merchant from Hamborow (innuendo) at his returning from Hamborow into England, and that I will justifie: The Defendant pleaded Non culp. and found against him, and damages 20 l. and it was moved by Grimston in arrest of Judgment, That these words be not actionable; for although it is to be agreed for saying of a Merchant, That he is broken in the present tense, Action lies; for it is all one as if he had said he is a bankrupt, which is a great discredit to a Merchant; yet when he saith, That he came over a broken Merchant from Hamborow, it doth not import in it self any scandal; for he shews that he came over eight years before, and he might become a rich man and of good credit since that time: And of that opinion was Richardson chief Justice; For slander ought to be expressed and not taken by intendment or implication; therefore if one saith of a Merchant, That he was a poor man within this seven years, or of a Workman, That he was a weak Workman, and had little skill within these few years, an Action lies not, for he may be rich, or a good Workman at the time of the speaking; so here, &c. for which, &c. but Jones, Berkley, and my self held, That the Action well lies, and it is not like the Cases before put; for there they do not charge him with any crime, and by intendment it may have good construction: But here he chargeth him with being once broken, Et qui semel malus semper presumitur esse malus eodem genere, or at least may have

have an inclination thereto, And it being alledged to be spoken falso & malitiosè, and to scandalize him in his Profession, it is a great cause of discrediting, and impairing him in his Trade, whereas their credit is the principal means of their gain: And if he intended it otherwise, or had spoken it in another sense, he ought to have shewn it by special Plea which would have excused him: But when he is charged with malicious speaking of those words, and with an intent to discredit him; and he pleads Not guilty, and found against him, That he spake maliciously, and with intent to discredit him, the Court may not otherwise adjudge; Wherefore it was adjudged for the Plaintiff.

Green versus Lincoln.

11. **A**ction for words. Thou art a long-shag-haired-murthering-Rogue. After Verdict upon Not guilty pleaded, and found for the Plaintiff, it was moved by Grimston in arrest of Judgment, That these words be not actionable; for he doth not charge him directly with the murder of any person, nor saith, That he is a Murtherer, but the words are Adjectively spoken, which manner of speaking shews that the words are of chiding, and do not aggravate but extenuate quoad the manner of speaking. But Henden Sergeant moved to have Judgment for the Plaintiff, and cited, That in Hillar. 7 Car. rot. 728. betwixt Wilson and Mason, in the Common Bench, it was adjudged after debate, That for these words, Thou art a murthering Knave, Action lies: But he had not the Record to shew; And therefore the Court advised till the next Term; And afterwards, Mich 9 Car. being moved again, it was adjudged for the Plaintiff.

Fish versus Wagstaff.

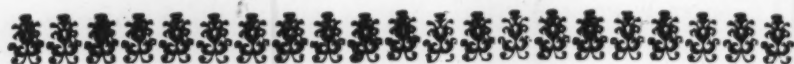
12. **E**rror of a Judgment in the Court of the Marshalsey, by virtue of a new Patent. The Error assigned was, Because in the Stile of the Court it was mentioned, That the Court is holden by virtue of the Kings Letters Patents coram such persons, Judicibus nostris, ad audiendum & terminandum assignat. omnia placita personalia inter omnes personas, infra 12. leucas in Palatio Regis apud *Westmon.* & inter omnes homines de hospitio Domini Regis, tam diu quam hospitium Domini Regis est infra 12. leucas à Palatio *Westmon.* and a Patent ad audiendum & terminandum omnes causas cannot be, but it ought to be only of criminal matters. Vid. Dy. 175. And for that reason the Judgment was reversed.

Sparrow

Sparrow *versus* Mattersock and others. Hill. 8 Car. rot.

T Respals. *Sur Demurrer* the Case was. The Sheriff returns up¹³ on an Elegit, That the party had not any Lands, but only within the liberty of St. Edmundsbury, and that J. S. Bayliff there, hath the execution and return of all Writs, who enquired, and returned an Extent by Enquisition, and that the Bayliff delibered the moiety of the said Land extended to the party, and that the Plaintiff by virtue of that Extent entred and intituled himself, and whether it were a good title for the Plaintiff, was the question? First, Whether the Bayliff of a Liberty may make an Enquisition and Extent upon an Elegit by warrant from the Sheriff, directed unto him? Resolved, That he may. Secondly, When a Jury by Enquisition finds the seisin and value of the Land, whether the Jury ought to set out the moiety for the Plaintiff, or if the Bayliff may deliver such part of the Land for the moiety? And it was resolved, That the Jury shall extend all the Land; and the Bayliff where there is a Franchise, and the Sheriff (where no Franchise is) shall deliver the moieties, and not the Jury; and so are all the precedents; Wherefore it was adjudged for the Plaintiff.

Termino



Termino Michaelis, anno nono *Caroli* Regis,
in Banco Regis.

Thomas Broxon and his Wife *versus* Dager and his Wife.
Trin. 9 Car. rot. 1152.

1. **A**ction for these words, spoken by the Wife of the Defendant, of the Plaintiff's Wife, Thou art a Witch, I will make thee come and say, God save my Mare: I was forced to get my Mare charmed for thee. After Verdict upon Not guilty pleaded, and found for the Plaintiff, Littleton Recorder of London moved in arrest of Judgment, That none of these words are actionable; for the first words, Thou art a Witch, without mentioning that she bewitched any Person, Cattel, or Goods, are too general, and no Action maintainable for speaking of them; and he cited Divers precedents, That for calling one Witch generally, Action lies not, if he doth not shew what Witchcraft he committed: And of that opinion was all the Court upon the first motion: And for the second words, I will make thee say, God save my Mare, there is not implied any Witchcraft: And for the last words, I was inforced to get my Mare charmed for thee, was a fault in the Plaintiff, who would procure charming, to prevent mischief to her Mare; Wherefore Rule was given, That the Judgment should be said until, &c.

King *versus* Edwards. Trin. 7 Car. rot. 992.

2. **E**jectione firmæ. Upon a special Verdict the Case was. John Boulting and Jane his Wife being seised of the Land in question, to them and the Heirs of the bodies of John B. remainder to Ed. B. and the Heirs of his body, the remainder to Will. B. and the Heirs of his body, remainder to George Edwards and the Heirs of his body, the remainder to the right Heirs of the said J. B. They being so seised, the said John B. and his Wife, and William B. (the third in the remainder) joyned in a feoffment with warranty, to Mathusaleh Keen; and after, the said Husband and Wife levied a fine to the said Keen: Afterwards the said John Boulting died without Issue, and the said Will. B. and Ed. B. died without Issue; and in the sixteenth year of King James the said Mathusaleh Keen died, and the Land descended to Rob. Keen, who, after the death of the wife of the said J. B. entred, and let to the Plaintiff, and the Defendant by the command of the said George Edwards ousted him: And whether the

the entry of the said George Edwards was lawfull, was the sole question: And it was argued by Germin for the Plaintiff, and by Maynard for the Defendant. The first question was, Whether this feoffment were a discontinuance of the Estate taile, and it was urged for the Defendant, That it is not any discontinuance; for the Husband during the Coverture, having a joynt Estate with his Wife in the Freehold, had not any Estate taile in possession, but quasi a remainder in taile, expectant upon a joynt Estate for life, and not executed; so then, not being seized of the Estate taile in possession, it cannot make a discontinuance; and to prove that, he cited Co. 3. fol. 5. Owen and Morgans Case, and Co. 3. fol. 61. Win-scots Case. But as to that point Richardson, Berkeley, and my self held, That the Estate taile is in him vested and settled, and that his and his Wifes feoffment makes a discontinuance; And although it was objected, That William Boulting, the third in the remainder, joynd in the said feoffment, so as it could not make a discontinuance, but that every of them respectively passed their Estates. All the Justices agreed, That this joyning of William is not material; for there is an intermediate remainder in taile to Edward Boulting, which is discontinued. But Jones doubted thereof, and conceived, It was not a discontinuance, because the Husband was not absolutely seized of an Estate taile, during the life of his Wife. The second objection was, That if this feoffment were a discontinuance at the Common Law, yet it is taken away quoad the Wife by the Statute of 32 Hen. 8. And as it is taken away quoad the Wife, so is it also quoad those in remainder after the Wife, especially the Wife surviving; and that the fine after the feoffment is but by way of release, and is no such fine as is intended within the Statute; for it ought to be such a fine which at the first passed the Estate, and not a fine which enures by way of confirmation: But all the Justices agreed, That this feoffment and fine to the same person make but one assurance; and when the Wife is barred, and her Estate destroyed by the fine, that she cannot enter, those in remainder may not enter, but are in case as they were at the Common Law: And as this Case is, they all resolved, That an express discent being found, it takes away his entry; Whereupon, by the assent of Jones, without further argument, it was adjudged for the Plaintiff. But for the first point Jones cited 38 Eliz. betwixt Worne and Webster, where it was held by the Court, It was not any discontinuance when the Wife survived; but if the Husband had survived, it should have been otherwise.

Sir Richard Snowde *versus*

Action upon the Case. Whereas one Christmas exhibited a Bill against the Plaintiff in the Chancery, and shews what, &c. and the Plaintiff had put in his answer thereto, and shews what, whereunto he was sworn, That the Defendant spake these
S C words

words of the Plaintiff, He (innuendo the Plaintiff) is forsworn in his answer to Christmas his Bill, (innuendo in his answer to the said Bill.) The Defendant pleaded Not guilty, and found against him, and damages 50 l. And it was moved in arrest of Judgement by Bramston Serjeant and Mr. Grimston, first, That he doth not shew in what point he was perjured; For there be divers precedents, That Endicements of perjury have been quashed for this cause, that they have not shewn the perjury to have been in a point materiall: But all the Court (Richardson absent) held it to be no good exception; for true it is, That Endicements ought to shew the cause of the perjury; but in an action for words, which is grounded upon the speech of another, it cannot be enlarged further than the other spake. Secondly, Because it is not said, That he is forsworn in his answer in Chancery, nor is it averred, that there is not any other Bill nor Answer, but that which is mentioned, and there may be another Bill in another place, sed non allocatur; For when it is shewn, there was such a Bill in Chancery, and an Answer thereto, and that the Defendant spake those words, and is found by Verdict guilty of them upon that occasion, the Action well lies without other averment; for it shall not be presumed, there was any Bill and Answer in any other place; Whereupon it was adjudged for the Plaintiff.

Dorothy Brian *versus* Cockman.

4. **A**ction upon the Case for words. Whereas the Plaintiff was of good fame, and alwayes free from adultery or fornication and other crimes, and after the death of Brian her late Husband, was in communication with one Cowley for a marriage betwixt them: That the Defendant to deprive her of her fame and to hinder her from the said marriage, spake of the Plaintiff these words, She is a Whore, and her Children (innuendo her Children which she had by the said Brian late her Husband) are Frambishes Bastards, (innuendo one Nicholas Frambish.) After Verdict, upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgement by Grimston, That these words be not actionable; For, for railing Whore there lies not any Action, and to say, That her Children by her former Husband are Frambishes Bastards, is repugnant in it self; for they cannot be Bastards which were born in the time of her former Husband: But all the Court held, That the Action well lies; For to say of a Widow who is in communication of marriage with another, That she played the Whore in her former Husbonds time, is a great discredit, and to say, That her Children are Bastards (although in truth they cannot be Bastards in Law, yet in reputation they may be so) is cause of losse of her marriage, and that none will marry with her; Wherefore it was adjudged for the Plaintiff.

Edwards

Edwards *versus* Woodden, Hill. Car. rot. 602.

REplevin. The Defendant made Conuſance as Baſtiff to John Cotton; for that the place where, is twelve acres, parcell of a Meadow in Staunsted, parcell of the Manor of Staunsted, of which Manor one George Bing Esq; was seised in his demesne as of fee, and so seised by Indenture, anno 12 Jac. granted a Rent-charge of thirty pounds to Sir Robert Heath and others in fee, issuing out of the said Manor, and that they by Indenture inroll'd within six Months in the Chancery, for three hundred pounds granted, bargained, and sold that rent to the said John Cotton and his heirs; wherefore for rent arrear at such a feast, he made Conuſance, &c. The Plaintiff in barre of the Conuſance confesseth, that the Land is parcell of the Manor, and that George Bing was seised of the said Manor in dominico suo ut de feodo, prout in the Conuſance; and that the said George Bing so being seised, granted the said rent to Sir Robert Heath and others. prout, &c. Sed quod diu antea the said George Bing aliquid habuit in the said Manor, and long time before the grant of the said rent, one John Leigh was seised in fee of the said Manor, unde, &c. and so seised, in quinto Eliz. devised that Manor to Richard Blunt for one hundred and twenty years, by virtue whereof he entred and was possessed, and so possessed anno 17 Eliz. granted the same to Thomas Blunt, who entred, and in anno 31 Eliz assigned that lease to the said George Bing, who likewise entred and was possessed; and so possessed in anno 37 Eliz. assigned it to Henry Bing, and that he anno 22 Jac. assigned it to Hammond Claxton, who entred, and was, and yet is possessed, and licenced the Plaintiff to put in his Cartell, who thereupon put in his Beasts, and the Defendant distrained them, &c. Upon this the Defendant demurred, and shewed for cause; first, That he doth not confess or traverse the grant to Cotton. Secondly, That he doth not shew how the seisin and grant of the said George Bing is avoided. Thirdly, Because the Plea is repugnant in it self. And now being argued at the Barre by Rolls for the Defendant, he shewed, That this Plea to the Cognisance is ill, because in the Cognisance it is pleaded, That George Bing was seised in his demesne as of fee, and granted that rent, &c. which is intended a seisin in fee in possession: Then when the Plaintiff confessed, That he was seised in dominico suo ut de feodo prout, it is a confession of the seisin of the fee in possession: And when he afterward shewed a Lease for years by another, long time before, and that Lease convey'd to the Grantor of the Rent, and from him, by mean conveyances to the Plaintiff, it may be intended, That the Grantor was seised of the fee in reversion, and not of the fee in possession; for it is not repugnant to the former part of his confession, and it is not a confession of the seisin alledged; wherefore he ought to have traversed absque hoc, That he was seised aliter vel alio modo, or

that he was seized modo et forma prout: Also he doth not shew how the fee came to the Grantor after the Lease; also there is not any full confession that the fee was in the Grantor, but by argument, which is not good in pleading. And for these reasons it was moved, That the Verre to the Conuſance is ill, and Richardson chief Justice and Jones were of that opinion upon the first motion: But I conceived, That the plea is a good confession and aboydance of the seisin in fee alledged, and there needs not any Travers; For when he intitles himself to a lease for years precedent, yet in esse, which is not chargeable with this rent, and allows the reversion in fee, expectant upon this Lease, to be in the Grantor; the pleading is good; for one seized in fee of a reversion, expectant upon a Lease for years, may well say that he was seized in dominico suo ut de feodo, for of that seisin he may have an Issue; and that this plea is good, appears in Plow comment. Adams and Wroteleys Case: And to shew how he afterwards came to the fee, lies not in the Conuſance of the Plaintiff; but he may well admit it, without prejudicing himself, he claiming by a precedent Estate not subject to that charge: And to take a Travers when he claims by a former Estate and admits it, is not necessary, and peradventure might be perilous unto him, as Cok, lib. 6. Helyers Case, Berkley conceived, although seisin is pleaded in Dominico suo ut de feodo, which shall be intended seisin in possession as it is pleaded, yet the plea is good in substance, because he avoids the charge against him by reason of the former Estate; and if there be any defect therein, it is only for want of Travers, and that is but form; and not being shewn for cause, but other causes immateriall, it is aided by the Statute of 27 Eliz. and the Defendant shall not have advantage thereof: And to this opinion, for this cause, Richardson and Jones seemed to incline; but they would advise, Et adjournatur.

John George and his Wife *versus* Harvey.
Cujus principium ante pag. 282.

6. **W**As now moved again by Rolls for the Plaintiff to have Judgement, That Action lies for these words, for saying, That she is a Witch, Because that all kind of Witchcraft is punishable by the Statute of primo Jacobi, and is intended to be such who hath conference with a spirit, and works by spirits. But all the Court seriatim delivered their opinion, That the Action lies not for calling one Witch, without alledging she hath done some act: But if it be said, That she bewitched any man or any thing, it well lies: But to say she is a Witch generally, is not actionable; For it is a common saying, You are a Witch, which may be by your tongue or looks, &c. Wherefore it was adjudged for the Defendant. Vide Pasch. 17 Jac. betwixt Hawks and Auge, adjudged accordingly; and Mich. 10 Jac. betwixt Towse and Sand.

Tyffyn

Tyffyn *versus* Wingfeild.

The Record was, Queritur in placito Transgressionis pro eo quod vi & armis cepit & chafeavit his Cattel into the Closs of J.S. for which he took them damage sesant, and the Plaintiff was inforced to pay unto him 40 s. for amends per quod he sustained damages, &c. After Verdict upon Not guilty, and found for the Plaintiff, Henden moved in arrest of Judgement because he did not conclude contra pacem &c. For the Bill recites, That it is placitum transgressionis; and the Declaration is vi et armis; Therefore he ought to conclude contra pacem: And because it is not so done, it is ill in substance, and not aided by any of the Statutes of Jeofays. But Grimston for the Plaintiff argued, that this is an Action upon the Case, for the Action is not brought meetly for the taking or chasing of his Cattel, but for an especial wrong, viz. for chasing them into another mans soyl, so as they were there Trespassers, and he inforced to compound for this damnification. And although it be vi et armis, yet that doth not prove it to be an Action of Trespass: For that may be in an Action upon the Case, as it is in the Earl of Rutlands Case Cok. lib. 9. fol. And although the recitall of the Bill be in placito transgressionis, yet it is not of necessity to be Trespass only, but may serve for trespass upon the Case: And all the Court being of that opinion, It was adjudged for the Plaintiff.

7.

Symonds *versus* Seabourne. Pasch. 8 Car. rot.

Action upon the Case. Whereas the Plaintiff, upon the ninth of October 5 Carol. was possessed of an ancient house in Worcester; and the Defendant, the ninth of October 5 Carol. was and yet is possessed of another house and void piece of Land adjoining to the North part of the Plaintiffs house, wherein were three windows, time whereof memory, &c. by which windows the light came out of the said void parcel of Land into the Plaintiffs house, time whereof, &c. That the said Defendant maliciously, to deprive him of the light coming by the said Windows into his house, the said ninth of October 5 Carol. erected a building in part of the said void piece, and thereby stopped the lights coming by the said windows into his house, whereby his house is totally darkned, and he much prejudiced by that stopping. The Defendant pleaded Not guilty, and found against him. And exception was taken in arrest of Judgement, That the Declaration is repugnant in it self: For to say Adhuc possessionatus of the said void piece of Land, & to shew the offence in erecting a building upon it, shews that it is not now a void piece of Land, and of this opinion was Berkeley; but Richardson, Jones, and my self held, That this is good enough, and no repugnancy in the Adhuc possessionatus; for it may be that part of

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the said void parcel of Land is builded, and darkens his light, and part remains still void; and the Declaration as to that, is but surplusage and the one part well stands with the other. Another exception, Because he alledgeth not any person in whom the Prescription may be fixed; and the Plaintiff is but Lessee for years, who cannot prescribe. But it was answered thereto, That the time whereof, &c. is tyed to the house, and not to any personal prescription; and being an ancient house and Windows therein, time whereof, &c. there need not any prescription in any person; wherefore it was adjudged for the Plaintiff.

Baal *versus* Baggerley. Trin. 9 Car. rot.

9.

Action *sur* Case. Thou hast forged a privy Seal and a Commission; Why dost not thou break open thy Commission? After Verdict, upon Not guilty pleaded and found for the Plaintiff, it was moved in arrest of Judgement, That these words be not actionable: for he did not say the Kings privy Seal, nor any Writing under the privy Seal; and it doth not appear what privy Seal he intended. Also he saith not what Commission. And the words subsequent Thy Commission, shewed that he intended a Commission made by the Plaintiff himself. But it was answered thereto, That a privy Seal is intended, the Kings privy Seal, and being spoken generally, is to be intended according to the vulgar speech, and intendment, and no other Seal is meant thereby, besides the Kings: And Thy Commission is intended a Commission, which is sued out under the privy Seal. And to this opinion the Court seemed to incline; but Berkeley doubting thereof, the Court would advise. Afterward it was moved again and argued by Palmer for the Defendant, and by Calthorp for the Plaintiff: And Palmer shewed, That these words do not import in themselves, That he spake of the Kings privy Seal; for there is not any inducement, that there was any speech of the Kings privy Seal; and the words in themselves do not import any slander, and they shall not be helped by an intendment or innuendo. And it may be, that a private person might have a private Seal; and the words after, shew the intent of the Defendant, when he said Thy Commission, innuendo the Commission of the Plaintiff. But it was thereto answered by Calthorp for the Plaintiff, That the words shall be taken according to the vulgar opinion, and as the Auditors understand in their usual phrase, which is, that he spake of the Kings privy Seal, when he said A privy Seal; and when he said Thy Commission, it is to be intended, the Commission under the privy Seal, which the Plaintiff sued out: And Calthorp cited Trin. 35 Eliz. where one brings an Action for these words, Thou hast forged a Writing for which thou wast brought into the Star-Chamber: It was adjudged in the Common Bench, That the Action lies; for they be intended such Writings for which one shall be punished. And all the Court *seriatim*, delibered

libereth their opinions, That the Action well lies; For the words be spoken maliciously, and being alledged in the Declaration that he spake them to scandalize him for forging of the privy Seal and a Commission, and being found guilty, it shall be intended according to the vulgar interpretation, The Kings privie Seal, The counterfeiting whereof is Treason: and a Commission shall be intended The Kings Commission under his privie Seal: And Berkeley agreed with the others. And Judgement was given for the Plaintiff.

Johnson versus Davy. Trin. 9 Car. rot. 1314.

Ejectione firmæ, of six Messuages, one hundred acres of Land, three hundred acres of Pasture, &c. After Verdict, upon Not guilty pleaded, and found for the Plaintiff, Grimston moved in arrest of Judgement, That this suit is by originall Writ, and the originall doth not warrant the Declaration; for the originall is of one Messuage and sixty acres of Land, and so varies from the originall in the number of the Messuages and the Land. But Rolls for the plaintiff said, That this shall not be intended the originall, upon which the Plaintiff declared; but that there was another originall which warrants this Declaration, which is now imbezeld. And it shall not be intended to be grounded upon the Writ which is now gotten, first, Because the Writ bears teste 18. April. returnable 15. Pasch. and this Declaration is in Trin. Term. and here is no continuance upon this Writ. Secondly, Because the Writ is against the Defendant and a Copyholder; & in this Declaration there is no name of the Copyholder; wherefore it shall be intended, that this Declaration is grounded upon another Writ now wanting. And this want is aided by the Statute of Jeofayles. And of the same opinion was all the Court, absente Richardson, and rule given for Judgement for the Plaintiff.

10.

Penfon versus Gooday. Trin. 9 Car.

Action sur le Case. That the Defendant maliciously and falsely, to deprive him of his life, spake these words of the Plaintiff, Thou hast taken out of my pocket 40 l. of my money; And I will cause thee to be indicted at the Sessions of the Peace, and to hold up thy hand at the Barre for it. Et ex ulteriori malitia against the Plaintiff at such a day after, said, He hath picked out of my pocket silver and gold. After Not guilty pleaded, and found for the Plaintiff, it was moved by Grimston in arrest of Judgement, that these words be not actionable, especially the last words; and being spoken at several times, and there lying no Action for the last words, and damages intire given, The Plaintiff ought not to have Judgement: And to prove that, he cited the Case betwixt Osborn and Middleton: And the whole Court was of the same opinion, That if the words

11.

words spoken at any of the times will not bear an Action, and intire damages be given, There shall no Judgement be entred: And therefore the difference is, when the words are all spoken at one time and part of them are actionable and part not, There damages shall be intended to be given only for those words which were actionable. But where words are spoken at severall times, and the first be actionable, and the other not, and the Defendant found guilty of both, and intire damages given, There no Judgement shall be entred. But in this Case, the first words, without question, were actionable; For he directly charges him with a felonious taking, when he said, He would cause him to be indicted, and to hold up his hand for that cause. And they also held, That the last words being alledged to be spoken ex ulteriori invidia & malitia, have reference to the first, which is the picking of the pocket before mentioned, and so charging him with that felony; It was therefore adjudged for the Plaintiff.

Vesley *versus* Harris and his Wife. Hill, 8 Car. rot.

12.

Scirefacias. Whereas the Wife Dum sola fuit, recovered in the Kings Bench, in an Action upon the Case, 26 l. 13 s. 4 d. for damages and costs, and had execution of those damages, and yet is thereof posses; and whereas after wards the said Judgement was by a Writ of Error removed into the Erchequer Chamber and there reversed and restitution awarded; and after ward he took the said Harris to husband; The Plaintiff thereupon brought this Writ to have restitution. The Defendant pleaded, that after the reversal had, and before the purchase of this Writ, he paid to the Plaintiff the said Debt and costs of 26 l. 13 s. 4 d. absque hoc, That they be possessionati of the said money prout. And hereupon the Plaintiff demurred, because the Plea and Traversers be both ill. And now it was argued at the Barre by Calthorp for the Plaintiff, and by Germin for the Defendant. And Richardson, Jones, and my self held, That the pleading of the payment is ill, because it is grounded and affirmed against the Record, And a payment being against matter of Record, cannot be a discharge unless by matter of Record. And as in a Scire facias to have execution, payment is no plea in discharge thereof; no moze is it in a Scire facias to have restitution: And it appears by the book 20 H. 6. 24. & 21 H. 6. 15. that 'tis much doubted, whether if leyed by the Sheriff upon a Fieri facias it be good plea, and at length it was ruled to be good, because it is grounded upon the Fieri facias awarded, which he cannot withstand, and in reason therefore it should then be allowed, à multo fortiori, a bare payment is no Plea; And if it be a Plea, yet as it is pleaded, it is not good; for he doth not rely upon it, but Traverseth that which is immaterial, viz. Absque hoc that he is possessionatus, &c. which was idly alledged, and not material or traversable; and by his traversers, he waives his pleading of the payment, which being specially

ſpecially ſhewn for cauſe of Demurrer, the Demurrer is good, and Judgement ſhall be againſt the Defendant. Berkeley held, That payment had been a good Plea, if he had relied thereupon; Becauſe he avers that thereby the party is ſatisfied. And in divers caſes matter in fact may be pleaded in diſcharge. As in Debt upon an Eſcape, he may plead, That the Plaintiff commanded him to let him out of Execution, and ſuch like, &c. But as to the Travers, he conceived it ill, and therefore agreed with the other Juſtices, that Judgement ſhould be given for the Plaintiff; And it was adjudged accordingly.

Penſon and Anne his Wife *verſus* Gooday. Trin. 9 Car. rot.

Action upon the Caſe. Whereas he keepeth an Alehouſe being debito modo licentiaſus by Juſtices of the Peace, That the Defendant, to ſcandalize the Plaintiffs wife, ſpoke theſe words of her, Hang thee, Bawd (innuendo the ſaid wife:) Thou (the ſaid Anne innuendo) art worſe than a Bawd: Thou keepeſt an houſe (Meſſuagium prædictum innuendo) worſe than a Bawdy houſe: And thou keepeſt a Whore in thy houſe to pull out my throat. Upon Not guilty pleaded, and found for the Plaintiff, Stone moved in arreſt of Judgement, That theſe words be not actionable; but agreed, That for ſaying one is a Bawd, and keeps a Bawdy houſe, action lies, becauſe it is a tempoſal offence, for which the Common Law inflicteth puniſhment. But to call one Bawd without further ſpeaking, an Action lies not, no more than to call one Whore, which is a defamation only puniſhable in the Spiritual Court. And to ſay, That he keeps an houſe worſe than a Bawdy houſe, hath not any plain intendment what he meant thereby; wherefore the Action lies not: And if it be intended, That ſuch words ſhould hinder gueſts from coming thither, being an Ale-houſe, the huſband only ought to have brought the Action. And as to that, the Court (abſente Richardſon) agreed. But for the other words they held, That the Action lies by the huſband and wife, for the ſlander to his wife; and it is as much as if he had ſaid, That ſhe keepeth a Bawdy houſe: Wherefore it was adjudged for the Plaintiff.

13.

George Minn *verſus* Anthony Hynton Bayliſſ of the Liberty of the Dean and Chapter of Weſtmiſter. In Chancery.

The Plaintiff declares as Clerk of the Hamper, in an Action upon the Caſe, Whereas one Robert Treſwell 16. Febr. 4 Carol. was Bound unto him in an Obligation of 100 l. which was not paid; and whereas he for the obtaining of the ſaid debt, 12. Martii 5 Car. being Clerk of the Hamper in Chancery, proſecuted an Attachment of privilege, directed to the Sheriff of Middleſex to attach his body, returnable 15 Paſch. in Chancery, *ad respondend.* the ſaid George Minn in *placito transgreſſionis*, which Writ he proſecuted *ea intentione*. That

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the said *Robert T.* so being arrested upon his appearance, should put in good Bayl to answer him to his said Bill, by him to be put in, for the recovery of his said Debt upon the said Obligation. Which Writ afterward, *viz.* 13 *Martii* 5 *Caroli*, was delivered to the Sheriffs of *Middlesex* to execute; And that they the same day directed their Warrants under their Seals, to the Bayliff of the liberty of the *Dean and Chapter of Westminster* to arrest him: Which Warrant 14. *Martii* 5 *Caroli*, was delivered to the Defendant (Bayliff of the said Liberty) to execute: And that he by vertue of the said Warrant at *Westminster*, within the said Liberty, upon the 25. of *March* 5 *Car.* arrested the said *Robert Treswell*, and had him in his Custody: And that afterwards, before the return of the Writ, *viz.* 8. *April* 6 *Car.* to delay the Plaintiff of his Suit, and to defraud him of the recovery of his Debt, let him out of his custody and to go at large against the Plaintiffs will, and had not his body at the day; And that afterward *se esloynera*, and because he is delayed in his Suit and loseth his Debt, &c. The Defendant pleads thereto, That the said *Robert Tr.* found Sureties for his appearance *Arthur Squibb* and *J. w.* And at the day of the return of the Writ the Defendant returned *Cepi Corpus*; And that before the *Habeas Corpus* to bring him to the Barr, he the said *Robert Treswell* died, *Et hoc, &c.* The Plaintiff replies, That he did not take the said *Arthur Squibb* and *J. w.* Sureties for his appearance *modo et forma*: And hereupon it was demurred; And this was referred to Justice *Jones*, Justice *Berkeley*, and to *myself*, to consider of this Demurrer; and after argument, by counsel on both sides, we resolved, That this Declaration was not good, First, Because he doth not say of what Liberty he is Bayliff, or whether he hath execution and return of Writs: otherwise there is no colour to charge him, and therefore ought to be specially shewn. And of this opinion was *Jones*, and I agreed with him: But *Berkeley* doubted thereof, because being Bayliff of a Liberty, it cannot be intended another Liberty; and he admits it in his Plea, by making him a warrant to arrest. Secondly, Because he alledges, That he had an *Attachment of Priviledge* to arrest him for *Trespasse*, intending after his appearance to declare *in Debt*, which cannot be; For it is an abusing the Proceffe of the Court, nor can be so in any Court, but in the Kings Bench; and there the reason is, Because when he appears and puts in Bayl, he is supposed to be *in custodia Mareschalli*, and declares against him *in custodia, &c.* But so it is not in any other Court: Wherefore they all held, That the Declaration for this cause was not good, and that Judgement ought to be against the Plaintiff: and so we certified, That the Declaration was ill, and the causes wherefore.

Bawderok *versus* Mackaller.

15.

Information upon the Statute 31 Eliz. of Symony for the King and himself, supposing the Church in the Tower of London to be a Benefice with Cure of the annual value of 6 l. 13 s. 4 d. grantable

able by the King, and that one Such was Parson, and resigned; And that afterwards the Defendant agreed with J. S. to give him twenty pounds, if he might procure him to be presented thereto by the King, and admitted and inducted; And alledges in fact, That he procured the King to give unto him the said presentation to the said Chappel; and that he was admitted, instituted, and inducted thereto; and therefore he demanded 6 l. 13 s. 4 d. being the double value, secundum formam Statuti, &c. Upon Not guilty pleaded, and found for the Plaintiff, Henden Serjeant moved in arrest of Judgement, first, That this Information is not good, Because he shews the annual value to be 6 l. 13 s. 4 d. and the Statute is, That he shall forfeit a double value, and yet demands 6 l. 13 s. 4 d. as being the double value, whereas it appears, it is not, and therefore it is ill, Sed non allocatur; For the truth of the offence being shewn, and found against him, although he demands lesse than he ought, yet the Information is good for the King. And it was compared to the Case of Agard against Candish, which was adjudged in the Exchequer, Where an Information was brought for him and the King upon the Statute of Liveries; And it was brought after the year, which is not good for the party, by the express words of the Statute, yet it was good for the King, and Judgement entred. Secondly, It was moved, That this being a donative of the Kings Donation, is not within the Statute of 31 Eliz. for that mentions only where one comes in by Symony, by Presentation, or Collation, &c. Sed non allocatur; Because it is within an equall mischief, against which the Statute provides, and so within the remedy thereof. Thirdly, It was objected, that this could not be within the Statute, Because the King being Donor, it cannot be intended That he presented for Symony; and the Statute is, That the Patron shall lose his presentation for that time, and the King is to have it; therefore it shall not extend to any of the Kings donations; Sed non allocatur For Symony may be by compact betwixt Strangers, without the privity of the Incumbent or Patron, and yet within the purview of the Statute: As it was adjudged in Calvers Case in the Exchequer, as Jones cited it, Where the Father of the Incumbent contracted with the Patrons Wife, to give her one hundred pounds if the Patron would present his son, the Patron or Incumbent not knowing of this contract (as it was found by especial Verdict) yet this was held to be within the Statute: So here, he giving to a Stranger 26 l. &c. is within the Statute: Whereupon rule was given, that Judgement should be entred for the Plaintiff.

Chedleys Case.

CHedley being endicted in the grand Sessions at Anglesey in Wales, for petit Treason, a Cerciorari was prayed to remove the Endictment, and have it tryed in an adjoining County; and the Court being moved concerning their opinions how it might

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be tryed in any other County, doubted thereof: But it appears by divers precedents, That a Cerciorari hath been awarded in such cases into Wales, by reason of the Statute of 26 Hen. 8. which allows that Enditments in cases of felony may be enquired in the adjoining Counties: And Jones said, That in 32 Eliz. such a Cerciorari was granted upon debate; Wherefore the Court awarded a Cerciorari; and they said, when the Record was removed, they would advise how it should be tried. But afterwards it was stayed, and appointed to be argued, whether a Cerciorari were grantable.

Martyn Pages Case.

17. **M**artyn Page was indicted at Newgate Sessions, for that carnaliter cognovit one A. W. an Infant, under the age of ten years; And because upon evidence to the Jury at his arraignment, it was not proved, That he entred into the Childs body (but the contrary) although he very much had abused her, the Jury would not find him guilty of the felony; whereupon by advise of Justice Jones and Justice Berkeley, who heard the evidence, and conceived it a foul fact, and fit to be punished, an Enditment of Battery, for abusing the said Infant in lying with her, was preferred, and found, and he was thereupon tried this Term at the Barre, and being found guilty, was adjudged for this misdemeanour to be committed to Prison, there to abide during the Kings pleasure, to be fined two hundred Marks, to stand upon the Pillory in Chancery Lane in Middlesex, neer the place where the fact was committed, with a paper upon his head, signifying the cause, and to be bound with able Sureties to the good behaviour During life.

Arthur Crohagans Case.

18. **A**rrthur Crohagan an Irishman was arraigned the same day (viz. 25 Novemb.) of Treason; For, that he being the Kings Subject, upon the ninth of July 7 Car. Regis, nunc at Lysbon in Spain, used these words, I will kill the King (*innuendo Dominum Carolum Regem Angliae*) if I may come unto him; and that in August 9 Car. he came into England for the same purpose. To this he pleaded Not guilty, and was tryed by a Jury of Middlesex, and it was directly proved by Wheeler & Elesey two Merchants, That he spake those words on Shipboard at Lysbon in Spain, in great heat of speech, with Captain Bask, and added these words, Because he is an Heretick; And for that his traitorous intent, and the imagination of his heart is declared by these words, it was held high Treason by the course of the Common Law, and within the express words of the Statute of 25 Ed. 3. And he coming into England in August last, and being arrested by a Warrant for this cause, most

most insolently put his finger into his mouth, and scornfully pulling it out, said, I care not this for your King, &c. all which speeches and actions, though he now denyed them, yet the Jury found him Guilty; Whereupon he had Judgement accordingly. He confessed, That he was a Dominican Frier, and made Priest in Spain. And although this, and his returning into England to seduce the liege people, were Treason by the Statute of 23 Elizab. yet the Kings Attorneys said, he would not proceed against him for that cause, but upon the Statute 25 Ed. 3. of Treason.

Thomas Adams *versus* Lord Warden of the Stanneries.

19. Thomas Adams, by Noy the Kings Attorney, prayed a Prohibition, against the Lord Warden of the Stanneries in Cornwall, and his Deputy there, and against Richard Adams and others; For that they procured an Order and Decree for the payment of a summe of money unto them, without any Bill and summoning the Defendant to appear, and without any answer or sentence of Court; so the proceedings were coram non Judice: And Noy said, All their proceedings there summarily, et de plano, without any formall course, were illegal, and the Kings Courts shall take notice where they proceeded irregularly, and shall controll them, and preserve the Jurisdiction of the Court: And he further said, That the Jurisdiction of the Stanneries is only for tinne matters, and where the persons which sue, or the one of them be a Tinner; Whereupon a Prohibition comprising all this matter was drawn and granted accordingly.

Swayn *versus* Stephens, ante pag. 245.

20. It was now moved again by Calthorp for the Plaintiff (none being there for the Defendant;) First, That an Action of *Trover* is not within the Statute of Limitations of 21 Jac. But all the Court una voce over-ruled it; For although it be not particularly mentioned in the clause of Limitations, yet it is under the generall words of Actions upon the Case, and it appears expressly, That it is so intended by the last Proviso in the Statute, wherein Action of *Trover* is specially mentioned. A second question was, The Defendant being beyond Seas at the time when the Statute was made, and untill primo Caroli, Whether the Plaintiff is to be relieved by the equity of the Statute, although he be not within the express words of the last Proviso: For that provides only where the Plaintiff is over the Sea, to have his Action when he returns, if he brings his Action within the year after his return; but there is no mention, when the Defendant is over the Seas, of enlarging the time. And it was strongly urged by Grimston for the Plaintiff, That he is within the equity of the said Proviso; for it would be inutilis & stultus labor, to sue one to Outlawry being beyond

Seas, when it is erroneous and reversible at his return. And of that opinion were Jones and Berkeley, That the Defendant being beyond Sea, is within the equity and intention of the Statute, as well, as where the Plaintiff is beyond Seas: But Richardson chief Justice doubted thereof, and said, That he would not deliver any opinion; But I conceived, That the Defendant being beyond Seas, is not within the equity of the Statute; For the Statute providing remedy where the Plaintiff is over Seas, and omitting where the Defendant, &c. did it purposely, and never intended to provide any remedy for him, because the Plaintiff may prosecute his Suit by originall, although the Defendant be beyond Seas, unto an outlawry, which will shew, there was not any remissness in him, which is the matter which the Law intends, and that there should be a fresh prosecution: And when the Defendant reverseth the Outlawry, the Plaintiff shall then know where he is, to prosecute the Suit against him; so the first Originall is not merely a fruitless and idle labour, but thereby preserves his Action. Thirdly, For the departure from the Declaration, &c. Richardson, Jones, and Berkeley held, That the replication is no departure, but is pursuant to the Count, and fortifies it: But I conceived it was a departure, because it varies in the matter and in the time; For the Declaration supposeth a possession of the goods, and that, primo Martii vicesimo primo Jacobi, he lost them, and the same day the Defendant found them, and the first of October, tertio Car. converted them, and the Plaintiff in his replication shewes, That he the said primo Martii, 19 Jacobi, delivered them to the Defendant to transport unto T. in Spain, and to redeliver them upon request; and after shewes, That the Defendant 21 Martii, 19 Jac. at St. T. sold and converted them to his own use: So it varies in the point how the goods came to the Defendants hands, both for the matter and time. Fourthly, They held, when it is alleged, That the Defendant returned from beyond Seas primo Caroli, and that the Plaintiff tertio Caroli required the redelivery and he refused; And afterward, the same first of October tertio Car. converted them to his proper use, it shall be intended, That the said goods came a second time to the Defendants hands, and that they being in his hands, the Plaintiff required the delivery of them, and that afterwards the same day, he converted them, and that upon this conversion the Plaintiff had grounded his Action, and the Plaintiff had election upon which conversion he would bring his Action, and then he is clearly out of the said Statute of 21 Jacobi, the Action being brought within two years after the last conversion, and so well brought. But I doubted how this Action should be maintained, without shewing how they came to the Defendants hands, where it is allowed, That once he sold them in 19 Jacobi, and converted the money to his proper use; and the allegation, That he after refused to deliver, and converted them to his proper use, without shewing how he came to them, cannot be

be good. But the other three Justices being against me, they gave rule, That Judgement should be entred for the Plaintiff, unless, &c.

Dike versus Ricks. Hill. 8 Car. rot. 704.

REplevin. The Defendant avows, for that the place where, &c. is fourteen acres of Land in Edmuntton, whereof diu ante, &c. one Jerome Sugar was seised in fee, and held in Socage, and devised them to Elizabeth his Wife for her life, and died, and that the reversion descended to Jerome Sugar his Son and Heir, and he died seised of the reversion, which descended to Anne his Sister, Wife of the said Ricks; and that the said Elizabeth died, and the said William Ricks, and Anne entred, and by Indenture let those Lands to John Fenn, for one and twenty years, rendring 10 l. yearly rent, and he entred, And for the rent of half a year, due at the Annuntiation last past, he avows. The Plaintiff in barre to this avowry, confesseth the seisin of Jerome Sugar the father, and the tenure and devise to Elizabeth for her life, prout, &c. But he further saith, That he by the said Will appointed the said Elizabeth his Executrix; and further devised, & appointed, That if in case it should fully and sufficiently appear, That the said Elizabeth should not find sufficient of the Goods, Chattels, and Debts, due to the said Jerome the Testator, to satisfy his Debts, and to maintain the said Elizabeth and her Childzen, that then he should sell all the said Tenement, or so much, as with his Goods and Debts owing him would satisfy his Debts, and maintain her and her Childzen: And he alledgeth, That in 43 Eliz. it sufficiently appeared to the said Elizabeth, That the said Jerome had not at the time of his death, Goods, Chattels, and Debts owing him sufficient to satisfy his, the said Jeromes Debts, & to maintain the said Elizabeth & her Childzen; wherefore, he by Indenture inrolled in Chancery within six moneths for 160 l. bargain'd and sold the said Tenements to William Sugar and his Heirs; by virtue of which Bargain and Sale, and by the Statute 27 Hen. 8. of Uses, the said William Sugar was seised in fee; and afterward Jerome the Son released unto him and his Heirs, who by Fine conveyed it to the Plaintiff, and traaverseth, That the said Jerome, the Son, died seised of the Reversion; And thereupon the Avowant demurred. And now being argued at the Barre by Grimston, it was adjudged for the Defendant, That the Plea to the Avowry was not good; First, Because he doth not shew what was the value of the Goods and Debts due unto the Testator, and what was the summe of the Debts which he owed, and what was the value of the Lands sold, so as it might appear to the Court, That he had cause of sale of the whole Land; for he had authority only to sell as much as should suffice, &c. Secondly, For that the Will, giving the authority to sell, and he pleading a Sale by Indenture of Bargain and Sale inroll'd, and that by virtue thereof,

of; and of the Statute of 27 Hen. 8. of Uses, he was seized of the Reversion, &c. it is not good; For if the Sale be good by the authority of the Will, he is not in, by the Statute, but by the Deed; And where it was said, That this Sale shall be, quoad the Estate for life only, which is transferred by the Statute, and the Reversion was conveyed by the Will, It was held, That when he took upon her to sell, he sold the intire Estate and Inheritance of the Land, wherein the Estate for life is contained, and he did not by authority of the Will convey the Reversion only, expectant upon the Estate for life. And Jones said, That in 22 Jac. betwixt Davie and Utber, both these points were adjudged accordingly. Thirdly, It was held, That the pleading of the Release is to no purpose, Because, although the Release be by him and his Heirs, yet it is not a Release to him and his Heirs; And when by the Bargain and Sale, the Estate for life of the Lessee only passed, this Release doth not enlarge it, to increase the Estate. Fourthly, Where it was alledged, That this Plea is an inducement to the Traversers, and therefore not issuable; and then there needs not so much certainty as where the matter is issuable: Yet the Court held, That the Plea is not good; For an inducement to a Traverser ought alwayes to be sufficient in matter, which is not here; Wherefore it was adjudged for the Avowant.

..... against the Inhabitants of the Hundred, &c.

22.

Error, of a Judgement in the Common Bench, in an Action upon the Statute of Winton, of Hue and Cry. The Error assigned was, Because the Master brought the Action for a Robbery committed upon his Servant, and the Servant was sworn, where it was objected by Calthorp, That the Master who had the losse ought to be sworn; But it was answered by Grimston, That the Servant ought to be sworn and not the Master; For although the losse is to the Master, when his Servant is robbed of his money, yet the Servant, upon whom the Robbery was committed, is the proper person to be sworn, that he was robbed, and that he knew not any of the Robbers. The second Error insisted upon, was, Because the Action is brought by the party and the King, yet neither upon the joyning of Issue, nor in the Venire facias, is there any mention of qui tam pro Domino Rege, &c. but of the party himself only. Sed non allocatur: For it was said, That true it is, when the Action is brought upon a penall Statute, where part is given to the King, and part to the party prosecuting, there it ought to be so, and it is the common course to enter the party qui tam pro, &c. But when the King is only named, as an offence against the King and the party, and the King is not to have any part of the summe recovered, but only to have a Fine; there neither in the Issue

Issue now in the Venire facias is any mention of Qui tam, &c. and so are all the presidents, as Keeling affirmed. And of that opinion was all the Court; Whereupon Rule was given, That Judgement should be affirmed.

Anonymus.

Action upon the Case, for these words, Thou hast given *f. s.* nine pounds for forswearing himself in Chancery, and hast hired him to forge a Bond. After Verdict upon Not guilty pleaded, and found for the Plaintiff, Mallet the Queens Solicitor and Holbourn moved in arrest of Judgement, That these words be not actionable; for it is not alledged (as to the first words) That any suit was in the Chancery, or that he forswore himself in his answer, or as a Witness. Nor doth he say, That he suborn'd him to forswear, Nor that he gave that unto him to forswear himself, Nor that he knew that he forswore himself, Nor doth shew any particular wherein he forswore himself. And to say that he gave unto him nine pounds for forswearing himself, may be intended, That he was enforced to pay it by reason of his false oath. Sed non allocatur; for the words are to be intended according to the usuall manner of speaking, That he hired him to forswear himself; And although he doth not shew that he was sworn in Chancery, nor what he swore, it is not materiall, for if he never was sworn, it is scandalous unto him to say, That he procured one to forswear himself in a Court of Record, although it is merely false, because he never was sworn. Secondly, To the words, That he had hired him to forge a Bond; although it is not said, That he hath forged a Bond, or that it appears he hath done the Act, it is scandalous. And so held all the Court; Wherefore it was adjudged for the Plaintiff.

Mackaller *versus* Todderick.

Error of a Judgement in the Court of the Tower of London in Assumpsit, Where the Plaintiff declared, That the Defendant promised him, in consideration that he would procure the said Mackaller to be presented and instituted to the Chappel of the Tower, being a donative in the Kings gift, &c. to pay unto him twenty pounds upon request. The Plaintiff alledgeth in fact, That by his labour and means the King presented the said Mackaller to the said Chappel, and he was admitted, instituted, and inducted into it; and that he required the payment of the said twenty pounds at such a day, &c. and the Defendant had not paid it. The Defendant pleaded non-Assumpsit; and Verdict and Judgement for the Plaintiff. And now Error brought, The Error assigned, That Judgement was given for the Plaintiff, where it ought to be for the Defendant. And now Fletcher for the Plaintiff in the writ of Error moved, That this Judgement was erroneous, because

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he declares upon a promise grounded on a consideration against Law; and that being the only consideration, the Assumpſit is void; and for that relied upon the Case of Onely, 19 Eliz. Dy. & Cok. lib. 3. fol. 82. Et adjournatur. Residuum poſtea pag. 353. et 361.

Eliot *verſus* Skyppe.

25. **D**Ebr, for nineteen pounds, ten ſhillings, and Counts upon a Lease for years of certain Copyhold lands, rendring eight and thirty pounds per annum at Michaelmas and the Annuntiation, by equall portions; and upon a Lease of certain freehold lands in the ſaid Vill, rendring twenty ſhillings per annum at the ſaid Feaſts: And for nineteen pounds for half a year of the ſaid Copyhold, due at the Annuntiation laſt, and for ten ſhillings for the Freehold due at the ſame Feaſt, the Action was brought. The Defendant pleaded Non debet, and found for the Plaintiff quoad the ten ſhillings for the Freehold: And for the nineteen pounds, quoad the Copyhold rent, it was found for the Defendant. And the Clerk of the Miſe returned the Poſtea, That it was found for the Plaintiff quoad ten ſhillings parcell of the ſaid nineteen pounds ten ſhillings; Et quoad the nineteen pounds residue of the ſaid nineteen pounds ten ſhillings, That the Defendant Non debet. And for this cauſe it was moved in arreſt of Judgement, That the Verdict is incertain, which of theſe rents was not paid. But becauſe that this Iſſue was tried before Juſtice Berkeley, and he well remembered, That the Jury found for the Copyhold rent for the Defendant, and for the Freehold rent for the Plaintiff; therefore it was ordered, That the return of the Poſtea ſhould be amended accordingly: And that then the Plaintiff ſhould have his Judgement.

Termino



Termينو Hillarii, anno nono *Caroli* Regis,
in Banco Regis.

Memorandum, That in the Vacation, betwixt *Michaelmas* and *Hillary* Term, Sir *James Weston*, one of the Barons of the Exchequer (who was a wise and learned man, and of courage) dyed at his Chamber in the *Inner-Temple*. And afterwards *Pasch. 10 Carol.* *Richard Weston* of the same *Inner-Temple* was made Serjeant; and within four dayes sworn Baron of the Exchequer.

1.

A Prohibition was prayed by *Calthorp* for against Parson of *W.* in the County of *Westmorland*, for suing for tythe of *Trowts* taken in a River, because they be *feræ Naturæ*, and shewed a president in 5 *Car.* where a Prohibition was granted against the same Parson, for suing for tythes of *Eeles* taken in the River, because they be *feræ Naturæ*; and day was given to the cause why it should not be granted. And *Richardson* said, That he knew where one suing for *Conies* taken in *Methold* *Warren*, a Prohibition was granted upon debate: And that in *Yarmouth* was a Suit for tythes of *Herrings* taken in the Sea, but they could not prevail. *Jones* said, That in his Country of *Wales* they use to pay tythes for *Herrings*: And in *Ireland* it is a common course to pay tythe of *Salmons* taken in Rivers. *Richardson* said, That, peradventure, may be by custome; otherwise tythes be not payable for *Fishes* taken in Rivers.

2.

Gobbets Case.

Prohibition was prayed by *Bulstrode* for *Gobbet*, to stay a Suit in the *Spiritual Court*, for defamation, in speaking these words, He is a Cuckoldly Knave, and cited presidents, that for saying, He is a Knave and a cheating Knave, suit being in the *Spiritual Court*, a Prohibition was granted upon good advisement. And the Court said, That president is not like to this Case; for there was not any offence wherewith the *Spiritual Court* ought to meddle; but in this case for these words, it is properly to be examined and punished there pro reformatione morum; for it is a disgrace to the Husband as well as to the Wife, because he suffers and connives at it; Whereupon (absente *Richardson*) it was denyed to grant a Prohibition. Secondly, It was moved, That this should be granted upon the Statute of 23 *H. 8.* because he was sued in the Court of the *Archies*, which is in the *Archbishops Jurisdiction*, and the words were spoken at *Thistleworth* in *London Diocese*, as appeared by

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the Libell. But Jones said, That he was informed by Doctor Duck Chancelloz of London, That there hath been for long time a composition betwixt the Bishop of London and the Archbishop of Canterbury, That if any suit be begun before the Archbishop, it shall be alwaies permitted by the Bishop of London. So as it is quasi a general Licence, and so not sued there, but with the Bishops assent, and for that reason the Archbishop never makes any visitation in London Diocese: And hereupon the Prohibition was denyed.

Chapmans Case.

4.

ERror by Chapman, to reverse a Judgement against him upon an Endiament of being a common Barretoz, where having traversed it in the County of Devon before the Justices of Assise there, and the Endiament found and Verdict against him. And Judgement being given, that he should pay one hundred Marks for a fine, and be imprisoned for two moneths, and Ideo in misericordia. The first Error assigned was, Because the Endiament is, That he was a common Barretoz contra formam diversorum Statutorum, which is not good; for it is an offence at the common Law, and there is not any Statute to punish it. Sed non allocatur; For so is the common course of Endiaments. And common Barrettry is an offence against divers Statutes, viz. Maintenance, and the like. The second Error, Because upon the Endiament, proccesse being awarded, he appeared gratis at the following Assises, and pleaded Not guilty: And then a Venire facias was awarded retournable the same Assises, and was thereupon then tried and found guilty. That this Venire facias was misawarded to make it returnable at the same Assises, where it ought to have been returnable at the next Assises; so as there ought to have been fifteen dayes betwixt the Teste of the Writ and the day of the retourn, and not to have been made returnable the same day. Sed non allocatur; For it is the common course throughout all England: And as Rolls who moved it said, That true it is when he is in the Gaol, such a Cryal may be the same Assises, But not so when the party is at large and comes in gratis. But the Court said, It is all one, and the Cryall good as well in the one case as in the other. And so it is here a good Cryal: Wherefore, &c. Thirdly, It was alledged for Error, because it is Ideo in misericordia, where it ought to have been Ideo capiatur, being upon Endiament for an offence finable. But it was thereto answered by Beare, That the Record is Ideo committitur Gaile (being there present) to remain for two moneths. So there needs not an Ideo capiatur, but where he is absent; for the Ideo in misericordia is but surplusage: Wherefore for this cause Curia advisare vult.

Pridgeons Case. Postea pag. 350.

Pridgeon was brought to the Barre upon an Habeas Corpus, and it appeared upon the return thereof, That he at Lincoln, upon complaint to two Justices of the Peace next adjoining, was ordered to keep a Bastard Child, he being according to the said Order the reputed Father. From this Order he appealed to the next Quarter Sessions of the Peace; at which Sessions the matter being examined, he was discharged, and the former Order repealed. Afterwards at another Quarter Sessions of the Peace, the matter being re-examined, it was ordered according to the first Order, That he should be accounted the reputed Father of the Bastard, and should keep it; And that if he did not perform it, he should be apprehended and committed; and thereupon being apprehended and committed, and all this matter returned, the Court held, That he being discharged at the next Sessions, to which he appealed according the Statute of 18 Eliz. The second Sessions hath no power to alter it: And because none were there to maintain this return, he was bailed, and day given, That if other matter were not the won, &c. he should be discharged.

5.

Henry Cort *versus* Episcopum Sancti Davidis, Dorothy Owen, and Thomas Pritchard. Hill. 8 Car. rot. 454.

Error of a Judgement at the grand Sessions in the County of Pembroke, in an Assize of Darraign presentment by Henry Cort, against the Bishop of St. Davids, Dorothy Owen, and Thomas Pritchard, for the Church of Stackpoole

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The first Error assigned was, Because, upon the first day, Thom. Pritchard appeared, and cast an Essoyne, but the other two made default, whereupon Resummons issued against them, returnable die Martis next following; and at the next day they cast an Essoyn, which was challenged and denyed. And now moved to be Error, for that there was not idem dies given them, as there was to the first when he appeared and was Essoyned, and that there ought to have been one Essoyn allowed unto them. Sed non allocatur; For idem dies shall not be given when they make default, and after once default and resummons, an Essoyn is not allowable by the expresse words of the Statute of 12 Ed. 2. The second Error assigned was, Because the Count is, That he presented ad eandem, and doth not name the Church; last is uncertain. Sed non allocatur; For the Church is first named in the Plein, and needs not to be named again. The third Error assigned was, That Tales de circumstantibus was awarded, which ought not to be in an Assize, but upon Nisi prius, which was held a manifest Error, if it had been so: But upon view of the Record, there were not tales de circumstantibus. Sed quod habeat decem Tales secundum formam Statuti; for it is intended

rendered by their petition, that they took their Aſſiſe in the grand Seſſions, which is appointed by the Statute of 34 Hen. 8. cap. 26. The fourth Error assigned was, because the Issue being, whether Henry Cort did last present one Richard Dolber the last incumbent who was instituted and inducted upon his presentation: The Plaintiff offered in evidence Letters of Institution, which appeared to be, and so mentions that they were sealed with the Seal of the Bishop of London, because the Bishop of St. Davids had not his Seal of Office there: And those Letters were made out of the Diocels: And the Defendant had demurred thereupon, That those Letters were insufficient, and the Demurrer was denied, which Jones said was an Error, because they ought to have permitted the Demurrer, and should have adjudged upon it. But it was held, That the not admitting of the Demurrer ought not to be assigned for Error: For when upon the evidence, the matter was over-ruled by the Justices of Aſſiſe, That was a proper cause of a Bill of Exceptions, and the remedy which the Statute appoints in such case; and for the matter of the Letters of institution sealed with another Seal, and made out of the Diocels, it was held, They were good enough; for the Seal is not material, it being an Act made of the institution: And the writing and sealing is but a Testimoniall thereof, which may be under any Seal, or in any place: But of that point they would advise. The fifth Error assigned was, Because the Verdict finds the Issue for the Plaintiff; and that the Church was full of the Defendant of the presentation of the other Defendant, per tempus semestre modo præteritum, and doth not shew when, and how long time it was void, so as it might appear to the Court. But White answered, It is good enough, for it being found by the Jury, that the value of the Church by the year was 80 l. and that it was void per tempus semestre: The Court shall intend it to be the full time of half a year, and the Judgment being only for the 40 l. is well enough. And so the Court agreed. The sixth Error assigned was, Because the Writ of admitting the Plaintiffs Clerk, is awarded to the Arch-bishop of Canterbury, for that the Bishop of St. Davids was a party, whereas the Justices of the grand Sessions have no power to write to the Arch-bishop, for they have no power to punish him if he doth not obey. And of that point the Court doubted; but it seemeth prima facie, That they may well write unto him; for it is now a Court of the Kings, and a Quare non admisi lies, if he doth not admit. But when they were the Marches in Wales, then they had no such power; and for that cause a Quare impedit did lie in the adjoining Counties, but not so at this day: But they would advise. Postea pag. 348.

Brett *versus* Read.

A Sumplis. Whereas he was indebted to the Plaintiff in 20 l. 7. for rent arrear, in consideration whereof he assumed to pay, &c. Upon Non assumpsit pleaded, and Verdict found for the Plaintiff; it was moved in arrest of Judgment by Germin, That this Declaration is not good: For it is a real Contract, if it were upon a Lease for years; and a generall Assumpsit, which is but an Assumpsit in Law, lies not for it, no more than upon a Recognizance. Also it doth not appear, That it was a Rent upon a lease for years, but it might be Rent-service, Rent-charge, or Rent-seck, that is behind, which is more strong against the Plaintiff. Grimston moved for the Plaintiff, That the Action lies, because it shall be intended Rent upon a Lease for years, which is by Contract; and then an Assumpsit may well be maintained upon it: And vouched the Case of Sir George Mansell 17 Jac. who brought an Assumpsit against J. S. supposing, that in consideration the Defendant might have and enjoy quietly the herbage of such a Park for three years, he promised to pay 100 l. Adjudged, That the Action well lay, because it is but in nature of Rent. But all the Court held here, That the Action lies not upon the generall promise: But if he had alledged, That in consideration he should forbear the payment untill such a day, or upon such a speciall consideration, then the Action would lie; but not upon a generall Assumpsit, for the reasons before alledged; and the Case cited may be good Law: For it is a speciall promise to permit him to enjoy. And it was not a Lease, nor for Rent upon a Lease; Wherefore it was here adjudged for the Defendant.

Lord Hastings *versus* Sir Archibald Douglass.

Trin. 8 Car. rot. 1331.

Action *sur Trover & Conversion*, as Administrator of Serjeant Davies, for divers Jewells. Upon Not guilty pleaded the Jury found for part Not guilty: For other Jewells, That he is guilty; And for sixty five great Pearls, and sixty five small Pearls and a Diamond Chain, they found a speciall Verdict, That Serjeant Davies was possessed of them, and being so possessed, made his Will, and thereby devised the use and occupation of all his Plate, hangings, and Jewells to Dame Elionor his Wife, during her Widowhood, She giving good security to my Daughrer Lucie, Lady Hastings, to deliver and leave the same to my said Daughter Lucie, at the day of her death or second marriage, which should first happen. That he dyed possessed of those Jewells, And that after his death, the Administration of the Goods of the said Sir John Davies, was committed to the Plaintiff, That the said Elionor, the Wife of Sir John Davies, was the Daughter of the Lord Audley, Earl of

of Castle-haven, And that she in the life of Sir John Davies used the said Jewels, Et ut ornamenta corporis sui usually wore them. That after wards the said Elionor married with the Defendant, and that he converted those Jewels, &c. And if the Court shall adjudge for the Plaintiff, they find for the Plaintiff, and damages 37*l.* and if not, for the Defendant. Upon this speciall Verdict, it was argued at the Barre by Germin for the Plaintiff, and by Calthorp for the Defendant; And now this Term, it was openly argued at the Bench; and Berkeley and Jones argued for the Defendant, That she being the Daughter of a Noble man, and permitted to use them frequently, ut ornamenta corporis sui, and they being convenient for her degree, she should have them as her Paraphernalia; and when there be not debts to be paid (as it doth not appear there were any) she shall have them against the Executors or Administrators of her Husband, and that the Husband cannot dispose of them from his Wife, by his Will, but instantly by his death, the possession of them being in the Wifes custody, the property is vested in her, and the Husband cannot give them away; and that is of necessity and for conveniency in the Law; For it is not reasonable the Husband should leave her naked of those Jewels which she usually did wear, and are fit (according to her calling) to weare: And it appears by Lynwood, That the Wife against her Husbands Will, hath such an interest in Goods which are her Paraphernalia, That her Husband hath nothing to do with them; but she may make a Will of them in her Husbands life time, and may dispose of them in vita Mariti invito Marito: But they said, This is not allowable in our Law, That she should dispose of them in her Husbands life time, but when the Husband doth not dispose of them, they are instantly vested in the Wife: And although the Husband may make a gift of them in his life time, yet he cannot make a Will of them, to dispose, &c. And compared it to the Case, Where a *Feme* hath a terme, and takes *Baron*, he may give and dispose thereof in his life time, but he cannot dispose of it by his Will; as in the Case of Bransby and Grantham; and the Case of Bracebridge, Plow. 416. and in the Case primo Henrici quinto Executor 108. The King may give the Jewels of his Crown by Letters patents, but he cannot by his Testament dispose of them. And Berkeley said, That this permission of the Wife to wear them usually, is as a gift of them unto her by her Husband, and compared it unto the Case of 11 Hen. 4. 83. Where one takes my Son and cloaths him, or my Wife and cloaths her, it is as it were a gift of the said Apparell unto them: And as by the custome of London, and in some places in Wales (as Jones said) the Wife shall have the moiety of the goods, whereof her Husband dies possessed, yet her Husband in his life time may give all the goods, but by his Will he cannot prejudice her, concerning her part; wherefore he concluded, That she should have them notwithstanding the Will. And Jones said, That by the Civill Law, as the condition to tie her from marriage,

marriage, so the limitation to have these Jewels during her Widowhood, is void, because she is absolutely possessed of them; Whereupon they concluded, That Judgement ought to be given for the Defendants. But Richardson chief Justice and my self argued to the contrary, and that this is a good Will, and that she may not take them, but according to the Will: But if the Husband had not made a Will, but had left them to the disposition of the Law, and the question had been betwixt the Executor or Administrator and the Wife, where there be not any Debts or Legacies to be paid, or where there be Assets to pay all Debts and Legacies besides those Jewels; there peradventure, the Law will allow her to take and enjoy them as her Paraphernalia: But where the Husband hath made a Will and limited, how she shall have them, she ought to take them as the Husband appointed, and his Will is as good, and as well to be performed as his gift in his life time; and that it is not like unto the Case of 11 Hen. 4. 83. for there it is a good gift to the Son and to the Wife, by the Raviſher, and the husband may well assent unto them. So are the Cases 11 H. 4. 12. & 34 Hen. 6. 10. That goods dedicated to the service of a Chapell or Church are a good gift to the Wardens of them in Law; but this permission by the husband for the wife to wear them, cannot be a gift of them in Deed nor in Law; For the husband cannot give ought to the wife, they being both but one person in Law. And as to the objection, That although an husband may dispose of them by Act in his life, yet he cannot by his Will. It was answered, True it is, That a man who hath a thing real in anothers right as a terme; although he may give, yet he cannot devise it, as Plow. 192. in Bracebridges Case. So where an Executor makes a gift of goods, which he hath as Executor, it is a good gift; but a devise of them is not good, because he hath them *in autre droit*: But of all Chattells personall, although the wife had them before marriage, the absolute property by the marriage is vested in the husband, and he may give them in his life, or dispose of them by his Will: So of those goods which are termed Paraphernalia, the absolute property is in the husband; and therefore he may well devise them. And to the Cases, That the husband may by gift of all his Goods, bona fide, prevent his wife, That she shall not have any part of them, notwithstanding the custome in London, Wales, and elsewhere, yet by his Will, if he deviseth them, it shall not frustrate what she ought to have by the Custome, they agreed to be good Law; for Custome is another Law, and instantly by the death of the husband, fixeth the interest in the wife: But the goods which she claims as Paraphernalia be not given to the wife, but those which are of necessity and conveniency for her; And when the husband leaveth her what is for her necessity (viz.) necessary Apparell, he may well make a disposition of the residue, by his Will. And for that purpose was cited 19 Hen 6. 14. A Wife for her *Quarantine* may have her living *de communi*, but she may not take any thing,

thing, unless for necessity. And where the Civill Law saith, That he may make a Will in the life of her Husband of her Paraphernalia, yet the Common Law (whereby we are to be guided) is expressly contrary to it; That he may not make a Will of any goods but with her Husbonds Assent, and then it is as his own gift: But of an obligation of things in action, a Wife may make Executors by assent of her Husband, and may make her Husband her Executor, as appears by the Books 4 Hen. 6. 31. 39 Hen. 6. 27. 3 Ed. 3. Devise 12. 26 Ed. 3. 71. and the interest, and possession, and property of such goods as are called Paraphernalia, are in the Husband, and he may devise them to his Wife; And that he shall take them by the Devise, appears 33 Hen. 6. 31. Where he devised to his Wife her Apparel, and he justifies the taking of them by the devise and delivery of the Executor, 37 Hen. 6. 28. That he ought to take only her necessary Apparell, 1 Eliz. Dyer 166. 18 Ed. 4. 11. 12 Hen. 7. 23, & 24. That the property and possession of those Goods be in the Husband, and he may not make a Will of them without her Husbonds assent. And a Case was cited in the Exchequer Trin. 28 Eliz. betwixt the Lord Treasurer and others, Executors of Viscount Bindon, against Mary Viscountess Bindon, in an Action of *Trover & conversion*, of Jewels of the value of 1000 l. He pleads to all, besides such Jewels (which were a Chain and Bracelets, not exceeding the value of 160 l.) Not guilty: And as to them, he pleads, That he was the wife of Viscount Bindon at the time of his death, and he usually wore those Jewels as Ornamentes of her body, and avers, That the Executors had Assent to satisfy his funeralls, and all his Debts and Legacies, besides those Jewels; and Issue was taken, That they had not Assent to satisfy all the Debts and Legacies, besides those Goods; so thereby it is to be observed, That Jewels of 160 l. for a Viscountess were not allowable for Paraphernalia: And it was answered, although here in this case, the Defendant be the Daughter of an antient Baron of this Realm, and of an Earl in Ireland, yet being married to Serjeant Davies, he ought to have them as his wife: And there is not any necessity he should have a Chain of Diamonds, and the said sixty five great Pearls, and the sixty five small Pearls, which are things hanging loose, and are not in any Chain or Bracelets; and they be not for any necessity for Ornament or for cobering. But quacunq; via data, the Husband having expressly disposed of them by his Will, he may not against his will take them without the assent of the Administrator, and without delivery, and not of her own head detain them, without entering security: And where it is alledged, That in the Civill Law a condition to restrain a second marriage, is not allowed: This is no condition, but a limitation only, and it is reasonable he should take accordingly. And it was alledged, That this is not any devise of those Jewels, but only the use and occupation of the Plate, Hangings,

ings, and Jewels, during her Widowhood and no absolute gift of them, as is, in 37 Hen. 6. 30. the Case of the Grayle, and Plowd. in Weldens Case: And they concluded, That this is a good disposition by the Will, and a declaration of his intent, and takes away that, which otherwise she might claim by the Law; and his express declaration controlls any implied gift, as is pretended. And for as much as she hath not performed it, the limitation is determined, and neither she nor her Husband can have them; Wherefore they concluded for the Plaintiff.

The King *versus* Bagshaw.

Information by Fletcher for the King and himself against Bagshaw, and demands 22 l. upon the Statute of 5 Eliz. for occupying the Trade of a Goldsmith not being an apprentice to that trade. The Defendant pleaded the Custom of London, That one being an Apprentice for seven years, and made Freeman of London, of any Trade, may use any other Trade in the same City; and shews, That he was bound an Apprentice in the Art of the Cordweyners, and served therein for seven years, and was made Freeman of London, whereby he justifies, &c. The Kings Attorney demurs thereupon, and it was argued divers times at the Barre; first, Exception to the manner of the Plea, because he pleads quod uti possit any other Trade, and not quod usus fuit; and for that, was relied upon 22 Ed. 4. 8. Prescription, quod possit Turner son Plough. And doth not say, That he hath used to turn, &c. is not good. But it was thereto answered by Grimston, That this being alledged by way of Custome in the City, and not as a particular Prescription, is well enough; for peradventure it is a thing intended, and so not used in fact: And in proof thereof was cited 21 Ed. 4. 28. old Book of Entries 141. pleading, That every Citizen and Freeman may devise in Mortmain, allowed to be good: And to that opinion the Court inclined. Secondly, The matter of the Plea is not good, because Custome cannot be alledged against a Statute: But it was thereto answered, That being the Custome of London (which Customs are confirmed by Parliament) it shall be good. But thereof the Court doubted, and delivered not any opinion, because the Kings Attorney this Terme waived the Demurrer, and took Issue upon the Custome, and prayed that the Defendant might rejoyne: Whereupon the Defendant moved now by Rolls, That he might waive his Plea, and plead Not guilty. But the Court doubted whether he should be received, without the assent of the Attorney General; Wherefore they would advise: And afterwards the Attorney being moved, would not assent; Whereupon he rejoyned, &c.

9.

Cort *versus* the Bishop of St. Davids, ante pag. 341.

10.

WAs now moved again by Noy Atturney Generall, and he principally insisted, That the Verdict was not good; and the Jury had not well inquired, because they did not finde when the Church became void, but said in their Inquiry quod tempus semestre modo transiit, which may be long time before the Writ brought. But all the Court, seriatim, delivered their opinions, That the Verdict is good; and it is not necessary to finde when the Church became void. But modo transiit shall be intended, That the six moneths passed hanging the Writ, which is onely inquirable in respect of the damages. And when here the value of the Church is inquired and found of the annual value of 80 li. and that the Defendant Pritchard is found to come in ex presentatione of the Defendant Owen: So the Patron and Incumbent are named in the Writ; Although the Defendant may be in for six moneths by the same Patron which was named before the Writ brought, he ought to be removed. And the Judgement is for forty pound, which is the moiety of the value; therefore the inquiry and the Judgement are good enough. And for all the other errors assigned, The Court allowed none of them; And although the president be, That in the Declaration he declares, Et unde dicit quod ipse (idem the Plaintiff) ad eandem Ecclesiam presentavit, and here omits the words ad eandem Ecclesiam; Yet because it cannot have any other intendment, but that he presented to the same Church mentioned in the Plaint. And the words after, That he was admitted, instituted, and inducted in eadem, which refers to the Church mentioned in the Plaint; Therefore it was held good enough: Whereupon Judgement was affirmed.

Fayrewethers Case.

11.

A Certiorari was awarded to the Justices of Assise of the County of Suff. to remove an Endiament of Common Barretry against one Fayrwether, a Justice of Peace of the said County: And the Endiament being removed and the Defendant traversing it, and rule given for tryal thereof at the Barr, and that the Defendant should bear the charges of the witnesses, because the Record was removed at the Defendants Suit, Noy the Kings Atturney moved, That it should be tried in the County by Nisi prius, Because otherwise divers witnesses would not appear to prosecute by reason of the charge and trouble, and that the King hath his election in what Court and in what manner he will trie his Suits. But the Court conceived, Because it concerned a Justice of the Peace, who peradventure might have incurred the displeasure of many, by reason of his diligent executing his Office: and for that it is a cause

cause which will require great examination, and is not fit, by reason of the shortness of time, to be tried at the Assises *Nisi prius*, therefore they denied his motion, and held it convenient it should be tried in Banco. And divers presidents were cited of one Awtken and of one Whytler and others; where, in such case, Trials were in Banco. But the Kings Attorney said, Those were by consent: which was denied: And Keeling Clerk of the Crown said, That divers presidents have been of such Trials upon Endicements in Banco, without any consent of the parties, and against the will of the Prosecutors, and in more remote Counties. And the Court said by the Statute of *Nisi prius* it is appointed, That Trials shall be in Banco, where the causes magna indigent examinatione; as this case doth. But if the King will signify his pleasure, That they shall be tried by *Nisi prius*, it is fit he should be obeyed. Yet not upon suggestion of the parties only. Afterward the King by his Letters signified his pleasure, That it should be tried by *Nisi prius*.

Vicount Dunbarrs Case.

Note, All the Justices and Barons were assembled at *Serjeants-Inne* in *Chancery-lane*, by the Kings command, upon a Question concerning the King, in a case prosecuted by Doctor *Chambers* against Vicount *Dunbarr*: Where a Fee-farm, due to the King out of the Lands of the Viscount of *Dunbarr*, being arrear for divers years, was omitted out of the charge by the connivance or negligence of the Clerk, who ought to have put it in charge, and so continued untill the Pardon of 21 *Jac.* Whether it were discharged by the Pardon? And it was resolved that it was not; For it is a Debt to the King; and the omission of a Clerk shall not prejudice him, as also because it is excepted by the Pardon; if not by the words, at leastwise in the intent.

12.

Peck *versus* Ambler. Mich. 9 Car. rot. 348.

A Sumpfic. Whereas the Defendant, primo Caroli, promised the Plaintiff, That he should enjoy such Lands in possession, and that he would save him harmless concerning any Action and Suit against him for them, That he was ousted of the Possession by Meddlecourt 1. Jul. 3 Car. and that a good recovery was had against him in an Ejectione firmæ 2 Car. wherein he was condemned in damages and costs seven pounds; by reason whereof he feared to be arrested: And that, upon 1. August. 7 Caroli, he gave unto him notice thereof, and requested him to discharge him of that Judgement, and save him harmless from it; And that the Defendant had not discharged the Judgement, whereby he remained subject thereto, and durst not go about his business, to his damage, &c. The Defendant pleaded the Statute of 21 *Jac.* of Limitations, That this ouster was upon a Judgement in Trin. 2 Car. and the notice and request in July 2 Car. so more than six years after the

13.

cause of action, and before the Action brought; and traverseth the *ouster* in July 3 Car. or any time after July 2 Car. And hereupon the Plaintiff demurred. And now Whytfeild for the Defendant moved, That the Plea made good the matter alledged, because the breach was before the six years. And to that opinion the Court inclined. But because he failed in the other part of the breach of the Assumpsit, viz. in not saving harmless, but suffering the Judgement to remain in force, and by reason thereof he was endangered to be arrested, which part is not answered; therefore the Plea was held ill: For by the Judgement he is damnified, although it be not alledged, that Execution is sued, he being subject to the Execution and in danger to be charged. And although the Defendant be a Stranger to this Suit wherein damages and costs are given, and therefore ought to have notice; yet when notice is given unto him thereof, he ought to procure him to be discharged; and therefore the Plea is ill on that part; And the Demurrer being general, Judgement is to be given for the entire Assumpsit against him; and it was therefore adjudged for the Plaintiff. And Jones and Berkeley held, That if a man assume to pay fifty Quarters of Halt in five years, every year ten Quarters, If he fail of the payment of any of them, an Assumpsit lies, and he shall recover damages for all which is arrear, and for all the residue of the five years: But I doubted thereof. But for the principall we all agreed.

Margaret Harts Case.

14. **M**argaret Hart brought an Action in the Sheriffs Court in London, against another Woman, for saying, That she was an arrant Whore, and went from Chamber to Chamber playing the Whore. This was removed by Habeas Corpus into this Court and Bayle put in. Stone moved for the Plaintiff, to have the Cause remanded, Because for these words Action lies not here, But they were actionable there by the Custom of London, because she is there punishable for such offence. But the Court denied to grant a *Procedendo*, and said an action lies not for these words; but that she should be sued for Defamation in the Spiritual Court only.

The Case of Pridgeon. Ante pag. 341.

15. **W**as now moved again by Grimston. And all the Court, Richardson chief Justice being present, delivered their opinions seriatim, That the Order in the first Sessions was concluding; and the Order in the last Sessions was merely void: For the Statute of 18 Eliz. cap. 3. appointing, That upon Appeal to the Sessions from an Order of two Justices of the Peace, their Order shall binde him who is adjudged to be the reputed Father; and he in this case having appealed to the Sessions, and they making an Order in Court, That Order is finall, and no other Sessions

ons nor authorizty may meddle therewith. And to prove this Jones said, It was resolved by all the Justices of England upon conference, in the case of one Andrew Windfore, upon the Statute of 43 Eliz. of charitable Uses, If an appeal be upon an Order of the Commissioners of charitable Uses, to the Lord Keeper, and he by Decree confirm the Order, that confirmation is perpetually binding; and there cannot be a Bill of review thereof. So it hath been resolved, Where, upon the Statute of 37 Hen. 8. for Cythes in London, if a Judgement be given by the Lord Mayor, and upon an Appeal to the Lord Keeper that Judgement be affirmed, &c. the party is concluded, and shall not have aid by Bill of review; whereupon all the Court here resolved, That the second Order made at the second Sessions was meerly void, and his commitment unlawfull; wherefore he was absolutely discharged. And it was held, That the Statute of 3 Carol. doth not aid this Case; for the Statute there is, That if the two next Justices of Peace make not provision for the Bastard, the Justices of Peace at their Quarter Sessions shall settle an Order for keeping of the Bastard, as the two next Justices ought; but it doth not give more power or authorizty, nor gives authorizty to one Sessions, to alter that which in a former Sessions was ordered.

Wickham and others *versus* Enfeild and Elizabeth his Wife,
Mich. 8 Car. rot. 66.

ERror of a Judgement in Dower, by Wickham and others, against Enfeild and Elizabeth his Wife, late the Wife of William Symms, which he demanded as her Dower of the Lands of Will. Symms her former husband. The Defendant pleaded *Nunquid accouple in loyall Matrimony: Itue quod fuit accouple in loyall Matrimony*, and thereupon a Writ was awarded to the Bishop, who certified, That he was accoupled in vero Matrimonio cum prædicto Willielmo, sed clandestino; & quod Willielmus & Eliz. thori et mensæ participatione mutuo cohabitaverunt usque ad mortem prædicti Willielmi: and upon this certificate Judgement was given for the Demandant: And the Error assigned, That there was not a Writ original nor Warrant of Atturney for the Defendant. But, upon diminution alledged, the Writ was certified: But for the Warrant of Atturney, because it was not assigned of record that diminution might be alledged, it was held it was not now assignable. The second Error assigned, Because the Writ of view, upon view demanded, was awarded and returned, and nothing indorsed thereupon, That the Sheriff delivered the view. But because he afterwards appeared and pleaded, he shall not now have advantage thereof. Also the Court said, It was good enough without the Sheriffs name indorsed upon it. Thirdly, it was alledged for Error, That there was neither day nor place of the Barrage mentioned in the Bishops Certificate. Sed non allocatur; For the day

16.

or place of the Marriage is not materiall: for it is not Iſſuable, becauſe the Certificate from the Biſhop is concluding. The fourth Error was aſſigned ore tenus by Puleſton, of Counſell with the Plaintiff, in the Writ of Error, That this Certificate is not good; for it doth not anſwer to the words in the Iſſue, which are *quod ne unguis accomple in loyall Marriage*, and he ought accordingly to have answered, *Quod fuit copulatus in legitimo Matrimonio*: And he doth not anſwer to the words in the Iſſue; but *Quod vero Matrimonio*, ſed *clandeſtino copulati fuerunt*, &c. For, That it was a true Matrimony, and that they lived together at Bed and Board; is but argumentative, that they were lawfully married. Sed non allocatur; For vero Matrimonio, although clandeſtino copulati fuerunt is as good as legitimo Matrimonio, for they be all one in intendment, although they be not the ſame words; and although it be clandeſtino, it doth not vitiate the Marriage. And when it is added, That Thori & menſæ participatione durante vita, the ſaid Will, and Eliz. cohabitaverunt, That proves they continued as huſband and wife during his life, and it is not now to be queſtioned; Wherefore the Iudgement was affirmed.

Sharps Caſe.

17.

One Sharp was indicted of Perjury upon the Statute of quinto Elizabethæ: For that whereas one Henry Dampont was ſeiſed in fee of a Manor in Sheapſide in the County of Leiceſter, whereof one great waſte, containing two hundred acres lying betwixt ſuch a River on one ſide, and ſuch a Brook on the other ſide, was parcel. And whereas there was a ſuit in the Chancery betwixt the ſaid Henry Dampont and the Earl of Rutland, and a Commiſſion iſſued under the great Seal for the examination of divers witneſſes; and one interrogatoꝝ was exhibited, Whether he knew the parties? And ſecondly, Whether he knew the ſaid parcel of waſte in queſtion? And if it were the Soil and freehold of the Earl of Rutland and parcel of his Manor of Sheapſide, or not? He being examined upon theſe interrogatoꝝ before the ſaid Commiſſioners, falſly, voluntarily and corruptly deposed upon his oath, That it was the Soil and Freehold of the ſaid Earl of Rutland, and parcel of his Manor of Sheapſide; ubi revera, it was not the Soil nor Freehold of the ſaid Earl of Rutland, nor parcel of his Manor of Sheapſide; but parcel of the Manor of the ſaid Henry Dampont in Sheapſide, and ſo committed wilfull and corrupt perjury againſt the Statute of 5 Eliz. And Babington moved to quash the Edictment, and that it was ill, Becauſe he doth not ſhew what was the Iſſue in Chancery, nor that this Land was there in queſtion, nor it doth not appear that it tended to the proof or diſproof of the Iſſue, ſo as it might be a damage to the Plaintiff. And of this opinion were Richardſon chief Juſtice, and my ſelf. And although the interrogatoꝝ mentions it to be the Land in queſtion, it is not ſhewn
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how it is in question, and there can be no *Endiament* upon this Statute, but where it is shewn, That the deposition is upon the matter in question, and conducing to the Issue, and the party thereby prejudiced. And Richardson said, It is usuall in the Star-chamber to dismisss Bills, if it be not shewn what was the Issue, and how the perjury conduced thereunto, and how in prejudice of the party. Jones doubted whether the *Endiament* were good in respect of this exception; but because it was an obvious crime; he wthed the Defendant to plead Not guilty, and to try it; and upon the evi^lence it would appear whether it were pertinent, and what was the Issue, which ought to be proved. But Berkeley held it to be good enough; for it would be too prolix to shew the Bill and Answer, and what was the Issue. And in as much as it is alledged, there was a Suit betwixt them in the Chancery, and the interrogatory is, Whether he knew the Land in question? which shews that the Land was in question, and a convenient certainty is mentioned, it sufficeth: Otherwise he agreed it was not good; Wherefore it was advised, there being two *Endiaments*, he should plead to the one, and so try the truth, and the exception should be saved.

Mackaller *versus* Todderick. Cujus principium ante pag. 337.

WAs now moved by Gybbes for the Defendant in the *Writ* of Error, That the consideration is good; for it is for his solicitation and labour in procuring him to be presented, which in it self is no Symony, nor cause to avoid the Contract. And admitting it were Symony, yet not being an offence at the Common Law, nor triable by course of the Common Law (but an offence only made by the Canons) It was not punishable at the Common Law, untill the Statute of 31 Eliz. And therefore in Mich 40 & 41 Eliz. in the Common Bench, it was adjudged, That where an Obligation was for the payment of money, and the Defendant pleaded it to be made for the performance of a symoniacal Contract, and shews how; upon Demurrer it was adjudged, That it was merely a spiritual offence, whereof the Common Law did not take any cognisance; and therefore was no plea to avoid the Bond. And in 8 Jac. betwixt Taverner and Smith, in an Information upon the Statute of 31 Eliz. it was resolved, That he ought to suppose a corrupt Contract, and not a symoniacal Contract: And the Statute doth not make the Obligation and Contract for Symony to be void, as the Statute of 13 Eliz. of Usury, and the Statute of 23 Hen. 6. for Sheriffs. Fletcher to the contrary, for Symony bath alwaies by the Law of God and of the Land, been accounted a great offence: and an Assumpsit of Bond, with a condition to pay a sum of money for a symoniacal Contract, is accounted against Law, and void; As if one should promise another ten pounds to beat such a man, it is void, 2 H. 49. An obligation with a condition to save harmless

pp

con.

concerning imbezling of a Writ and not returning thereof, is void, because against Law. Richardson said, He much doubted thereof, because the promise is, To pay so much for his labour and travail, & not for the Presentation. Et adjournatur residuum postea pag. 361.

The King *versus* George Archbishop of Canterbury and Tho. Pryst.
Trin. 4 Car. rot. 441.

19.

Quare Impedit. Ad presentandum ad ecclesiam Vicariæ de Ichingstock, and makes title by the Statute of 21 Hen. 8. for that one Shilston, being Vicar of Ichingstock (which was a Benefice with Cure of Souls, above the value of 8 l. per annum) in the fifteenth year of King James took a second Benefice (viz. the Vicaridge of Holcomb-Burnel, in the County of Devon) being a Benefice with Cure; and was thereto admitted, instituted, and inducted, whereby the first Benefice became void, and remained void for two years, and so title of presentation accrued to King James, and from him descended to the King which now is, and therefore belongs to the King to present. The Archbishop claims nothing but as Ordinary. And the Defendant Pryst pleads. . . . and confesseth the Kings title from the acceptance of the second Benefice, whereby the first was void, and so remained void 21 Jac. and pleads the general Pardon of 21 Jac. and that the said Shilston was not a person excepted in the Pardon, nor the said cause of lapse excepted: And that John Shilston, so being Incumbent, resigned that Benefice of Ichingstock, and gave title to John Fayle to present; who, upon the said resignation, presented the Defendant, who was admitted, instituted, and inducted before the Writ of the King, &c. To this the Attorney General replies, Shewing the exception in the Pardon, wherein is excepted all Titles and Actions of Quare Impedit, others than such Actions of Quare Impedit which the King hath or may have ratione lapsus incurred ultra three years last past, for, or concerning any Benefice whereof any Incumbent then was; or the last day of the Parliament, should be in actual possession, by the presentation of any Patron, or the collation of any Ordinary: And that the said Church being so void by lapse, John Fayle presented, &c. And traverseth, That the said Vicaridge of Ichingstock vacavit per resignationem of the said John Shilston. Upon this Replication the Defendant demurred; and after divers arguments at the Bar, and twice argued at the Bench in the Common Pleas, & the Judges being divided both times, viz. Richardson chief Justice and Harvy for the Plaintiff, and Hutton and Yelverton for the Defendant; and afterwards Sir Robert Heath chief Justice of the Common Bench and Harvy for the Plaintiff, and Hutton and Vernon for the Defendant. By reason of this difference in opinions, it was adjourned into the Exchequer Chamber, and argued there at the Bar; and afterward by all the Justices of both Benches and Barons of the Exchequer, viz. by Sir Thomas Richardson, chief Justice of the Kings Bench, Sir Robert Heath chief Justice of the Common Bench, Sir Humphry Davenport chief

chief Baron of the Exchequer, and by all the other Judges and Barons, and two main questions were made, First, If an abondance of a Church happening and continuing void divers years, so as the King hath title to present by lapse, & the King doth not take advantage thereof, but dies, Whether the succeeding King may take advantage of this lapse, or be barred by the Statute of 25 Ed. 3. cap. 1. And that rested only upon the exposition of the said Statute, the words whereof are (And touching Presentments to be made by the King or his Heirs, to any Benefice in anothers right, by old titles, the King granteth, That from henceforth he nor any of his Heirs shall not take title to present to any Benefice in anothers right of any time of his Progenitors, Nor that any Prelate is bound to receive, &c. But that the King and his Heirs be for ever hereafter clearly barred of all such Presentments, saving alwayes to him and his Heirs all such Presentments in anothers right fallen, or to fall, of all his time, and of the time to come.) It was strongly urged at the Bar, and also at the Bench by those who argued for the Defendant, That this Statute extends to all the Successors and Heirs of King Edward the third, That none of them may present to a Church in anothers right (as they argued that this Church is) Because the King hath not that title as to his proper Abbotson, but in right of him who hath the Inheritance to any Church which falls in time of his Progenitors; and the rather for that in the Abridgement of the Statutes in the book of the Statutes, this saving is altogether omitted; So they conceived, The King was bound by the express words of the Statute, and that there is not any such saving. And of this opinion Vernon Justice continued. But Hutton who argued in the Common Bench for the Defendant in this point, That the title of the King was bound by the said Statute, And that he might not have title to present to a Church fallen in the time of his Predecessor by reason of his title of lapse fallen in the time of his Predecessor, now changed his opinion. And all the other Judges and Barons, besides Vernon, argued for the Plaintiff in this point, That the King hath good title to present by lapse incurred in the time of his Predecessor, and is not restrained by the Statute of 25 Ed. 3. For by the express words of the Statute, all rights and titles to present in his own time, untill before the Statute, and in his time after; and all his Heirs, after the death of Ed. 3. are saved. And it shall not barr the Titles which the King had in anothers right, fallen or to fall in his own time, or in the time of his Heirs: And that there was such a Saving, appeared by the Copy out of the Parliament Roll, and by an ancient Book in the Exchequer, writ in Parchment, where it is writ with a Saving, And they held, That these words Of old Titles, is intended in the time of the Progenitors of King Edward the third, and not of any Titles of Presentments to fall in the time of Edward the third, or of any of his Heirs, but intended to exclude King Edward the third and all his Heirs from Titles of Presentation in others right, fallen before the time of King Edward the

third, whereof any Church was full, and which Title is only in anothers right: And that was the express intent of the Statute, viz. to take away the Statute of 14 Ed. 3. cap. 2. in this point. And Berkeley and some of the Justices doubted, whether a Presentation by lapse shall be said to be in anothers right, but only Presentments by reason of Guardianship and Temporalities in the Kings hands: But all the other Justices and Barons agreed, That it shall be said to be in anothers right; for although he presents Ratione prerogativæ, yet he presents as in right of the Patron. So it is where one presents by reason of a Church being void after sequestration for alienation without licence, or for outlawry: And for that was cited 14 Ed. 3. Quare impedit 54. 22 H. 6. 29. 21 Eliz. Dyer 364. And for the principall point they relied upon 11 H. 4. 7. where it is so resolved 7 H. 4. 25. 18 Eliz. Dyer 347. Cok. lib. 7. fol. 28. And many Presidents, where the King makes Title to present by lapse, and title in anothers right. Wherefore for this point Richardson chief Justice (who argued alone in one day) said, It is to be taken for clear Law, that the King hath good title to present; and the Declaration was good notwithstanding that objection. The second question was, If Shilston were Incumbent and might resigne, Whether by his resignation the Church is become void? And that rested upon the exposition of the Statute of 21 Jac. of the general Pardon, and the Statute of 21 Hen. 8. of pluralities, whether the Church was absolutely void by acceptance of a second Benefice, being both with Cure, and if the Pardon unto him being in possession, may make him Incumbent? And this point was argued strongly in the Common Bench by Yelverton and Hutton, and afterwards there by Vernon and Hutton, and by both of them in the Exchequer Chamber for the Defendant, That this Church, by the Statute of 21 Hen. 8. was not absolutely void in fact, but is voidable quoad the Patron, That he may present by the Statute; but untill he presents, the other remains incumbent; and then he remaining incumbent, and for three years being in possession of the Church as Incumbent untill the Pardon of 21 Jac. And the Pardon then coming, he being in possession, establisheth him in possession, and continues him Incumbent; and he cannot after ward be ousted by the King or any other; and then he is Incumbent untill he resigne: and therefore his plea is good, For he is out of the exception of the Pardon, for he was in for three years before the Pardon; and therefore they said, he remained incumbent, that he might plead as Incumbent by the Statute of 25 Ed. 3. as he pleads here; Also he is Incumbent as to all Strangers, but not as to his Patron; for he may present before any deprivation, although a Stranger cannot, because the Church remains full against him; And he is Incumbent so as he may take a release of any annuity issuing out of the Parsonage; and is chargeable in an annuity, and is chargeable to the payments of Subsidies and Fifteenths; and may have an Action of Debt against any of his Parishioners for not letting out their Copes:

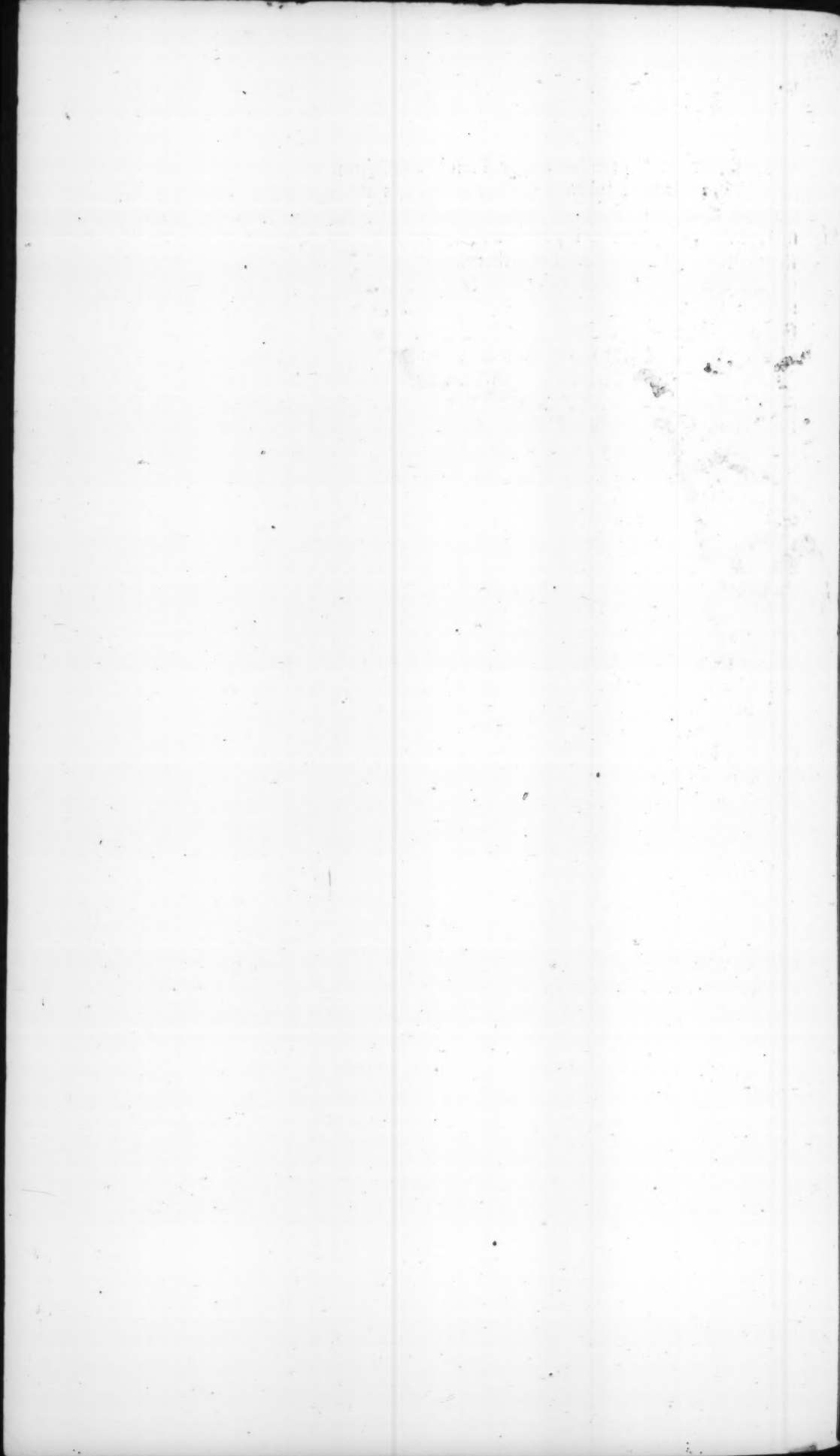
Cythes: And many other reasons they alledged, and said, That the penning of this Statute differs much from the Statute of 31 Eliz. of Symony, and from the 13 Eliz. for not reading of the Articles; Wherefore they concluded, That Judgement ought to be given for the Defendant. But all the other Justices and Barons argued against it; for they all held, That the Church was absolutely void in fact & jure by taking of the second Benefice, and that by the express words of the Statute of 21 Hen. 8. for at the Common Law, before the said Statute of 21 H. 8. by reason of the Canons and Constitutions Ecclesiasticall, the first Church was in jure void, so as the Patron might present thereto if he would; but because it was but an Ecclesiasticall Constitution, the Patron was not compellable to take notice of that aboydancer, untill deprivation and notice thereof given him; and then after deprivation the Church is void in fact & jure, and the Patron at his perill ought to present. And this appears by the books 9 Ed. 3. 2. 5 Ed. 3. 9. 10 Ed. 3. 1. 24 Ed. 3. 30. 11 Hen. 4. 37. Fitzh. N. B. 34. 14 Hen. 7. 28. Now by the Statute of 21 Hen. 8. it is made absolutely void after Admission, Institution, and Induction, so it is void fact & jure, and the Patron at his perill ought to take notice thereof and present within the six moneths, otherwise a lapse incurres; And that it was void to all purposes absolutely, appears by the manner of pleading in this and all other such cases, That by the Admission, Institution, and Induction to the second Benefice, Prima Ecclesia vacavit de Persona of the Incumbent, & vacans continuavit: So the Church is absolutely void by the pleading and confession of the Defendants: And this appears by the books since the Statute of 21 Hen. 8. That by the acceptance of a second Benefice, the Church is void fact & jure quoad the Patron and all others 18 Eliz. Dyer 347. Coke lib. 4. fol. 75. Hollands Case, & 78. Digbys Case, et lib. 6. fol. 29 Greens Case, & 23 Eliz. Dyer 377. & Cok. Book of Entries 368. And for the reasons before alledged on the other side, viz. That he may plead as Incumbent, that is, because he is admitted by the Writ to be Incumbent, and his pleading as incumbent is not contradicted; And for the taking of a release, it is much to be doubted; and if it be good, it is because he is in possession, as an Intruder, to whom a release may be a discharge of such things: And for his being charged with Subsidies, that is, because he hath the profits, and therefore reasonable he should bear and pay the charges. And Quoad his having debt for not setting forth Cythes, it was denyed by all those who argued on the other side: And as to the Pardon of 21 Jac. all the other Justices and Barons held, That the Pardon doth not help him; First, Because it is no offence within the body of the Act; for it is not any offence or contempt against the King. Secondly, Because it never was the Intent of the Pardon to dispence with pluralities, nor are there any words therein to make him an Incumbent, or to make a plenarty of a Church which was absolutely void. And divers of the Justices and the chief Ba-

ron held, That a speciall Pardon after such an absolute avoidance with words, That he may retain, or whatsoever other words he may have, cannot make him incumbent. So the generall words in the Pardon shall not inure to make a dispensation, and the Church being once void, shall not be full without a new Presentation, Admission, and Institution. And for the words in the exception of the generall Pardon, Of all Titles and Actions of *Quare impedit*, others than such Titles and Actions of *Quare impedit* as have incurred by lapse, above three years before the first day of this Parliament, whereof any Incumbent is in actual possession by any presentation or collation, &c. The last parts of this Exception doe not extend to the said Shilton; For that extends only to those who are in as Incumbents (which he is not) And not to those who are in as Incumbents by usurpation and wrong, which are removeable by *Quare impedit*, and which may not be removed without *Quare impedit*. And it was said, That since the Statute of 21 Hen. 8. there have been divers generall Pardons, and no Pluralities were ever conceived to be within them; Wherefore they concluded, That Judgement should be given for the Plaintiff. And it was adjudged accordingly.

The Earl of Kent *versus* Robert Steward and Scott.
Hill. 8 Car. rot. 235.

20. **T**Respals. Upon a speciall Verdict the Case was. Francis Babington, seized in fee of the Manor of Kingston in the County of Nottingham, and of the Manor of Asheton in the County of Derby, of which Manor of Asheton, the place where is parcel, by Fine, 41 Eliz. conveyed the said two Manors to Guilbert E. of Shrewsbury and his Wife, to the uses following (viz.) of the Manor of Kingston, to the use of them, their Heirs and Assignes, And of the Manor of Asheton, to the use of the Wife of Babington for her life; and after, to the use of the Heirs of Francis Babington, untill Julian Wife of Francis Babington shall evict and expell the said Earl or Countess, their Heirs or Assignes, their Farmors, Tenants, or Lessees, of or from the Manor of Kingston, or any parcell thereof; and after such eviction, then to the use of the said E. and his Wife, their Heirs and Assignes, untill they should be satisfied with the profits for their loss. Francis Babington, for money by Fine, in Hill. 43 Eliz. conveys the Manor of Asheton to Sir Thomas Reisbie and his Heirs, to the use of him his Heirs and Assignes. The Earl of Shrewsbury and his Wife by Fine, Trin. 43 El. conveys the Manor of Kingston to the use of the Earl of Kent and his Wife, and the Heirs of the Earl of Kent. Upon the first of April 17 Jac. Sir Tho. Reisbie deviseth the Manor of Asheton to Sir Francis Wortley and to others, for two thousand years. Upon the first of May 17 Jac. Sir Thomas Reisby dyed seized of the said Manor of Asheton. Upon

Upon the first of September 17 Jac. Francis Babington died; After his death, 20 Jacobi, Julian the Wife of Francis Babington evicted from the Earl of Kent in Dower, parcell of the Manor of Kingston, of the value of 200 l. per annum, and enters. The Earl of Kent enters into the Manor of Asheton upon the Defendants, being Assignees of the said Lease, who re-entered; and he brings this Action: And whether his Entry be lawfull, was the question? And after argument divers times, it was adjudged for the Defendants, That the Entry of the Earl was not lawfull. And the main question was, The limitation of Asheton, being to the use of the Wife of Babington for life, and after to the use of the right Heirs of Babington, untill the said Wife of Francis Babington should evict the Earl of Shrewsbury and his Wife, their Heirs or Assignes, their Farmors or Tenants of or from the Manor of Kingston, or any part thereof; Whether the Earl of Kent as Assignee may take the benefit thereof? And in this point all the Justices unanimously resolved, That he as Assignee might not enter, but that the use upon the Eviction ought first to vest in the Earl of Shrewsbury and his Heirs, and that this conveyance before the Eviction, cannot give unto him title of Entry as Assignee; For the words Heirs and Assignes are to be taken as words of limitation, viz. That the Earl of Shrewsbury by his Entry shall have it, by limitation to him, his Heirs and Assignes; and it shall not first vest in the Assignee as Purchasor; and it is not such interest which is assignable before eviction; and the power of Entry is not transferr'd with the Estate of Kingston: But whether the conveyance of the Manor of Kingston, and the conveyance of the Manor of Asheton by Francis Babington, before any eviction, hath destroyed the privy of Entry after eviction (the Estate being transferred to another before the eviction) they did not deliver any opinion, nor agreed. But for the first cause they all agreed, That the Earl of Kent hath no title of Entry as Assignee; And therefore for that cause it ought to be adjudged against him. Vid. Co. lib. 1. fol. 135, 136. Chudleys Case, Plow. 483. Nicholsons Case, Co. 8. fol. 75. Lord Staffords Case, Co. lib. 10. fol. 51. Lampets Case, Co. lib. 4. fol. 66. lib. 5. fol. 95. Plow. 345. Betts Case.





Termino Paschæ, anno decimo Caroli Regis,
in Banco Regis.

The King *versus* Bagshaw. Cujus principium ante pag. 347.

TH E Issue being joyned, Whether there were such a Custom as is pleaded: Littleton, now Recorder of London, certified, ore tenus, That there was not any such Custom generally; For he said, That the Custom is not, That one brought up as an Apprentice in the Trade of a Goldsmith, Cutler, &c. being a Freeman of London, by colour thereof may use any other manuell Trade: But one of a Trade, who useth buying and selling, may exercise another Trade of buying and selling. But this he did not mention in his Certificate, but generally, ore tenus, certified, That there is no such Custom as is pleaded.

1.

Mackaller *versus* Todderick. Cujus principium ante pag. 337. 353.

AND now the Court was of opinion, That the consideration was illegal, and that the Action lies not; For the consideration to have money, to procure him to be Rector of the Church, is a Symoniacall Contract and an unlawfull Act, condemned by all Laws. Vide 2 Hen. 4. 9. Coke lib. 10. fol. 99. Bewfages Case, & 19 Eliz. Dy. 355. Oneleys Case, 2 Hen. 5. 10. And where it was alledged, That Symony is such a spirituall thing, and such an offence whereof the Common Law takes not any notice; at leastwise did not, before the Statute 31 Eliz. That was denyed. Secondly, It was held, That this Declaration is not good; for the promise is to pay him; after that he is Rector; and he shews, That he was Rector by his procurement upon this promise, which cannot be; For he never was Rector, but a Parson utterly disabled to be a Parson by this Symoniacall Contract, as in 23 Eliz. for not reading of Articles; and the Case in Cok. Lit. Vernons Case, for the buying of Offices; Whereupon it was held to be Errour, and the Judgement was reversed.

2.

Ward *versus* Petifer.

3. **E**jectione firmæ. Upon a Lease for five years by the Vicars Choralls in Litchfeild, of parcell of a Meadow, called the Parsons Hayn, in Chesterton. Upon Not guilty pleaded, and evidence to the Jury at the Bar, the Defendant pretended, That the Lessors had not the interest of the Soil, but that the Freehold was in Sir Edward Peto; and that the said Lessors had only primam Tonsuram of the said Land, from the Hayning, untill the Crop mowed and carried away; for they never had other profit thereof, but that Sir Edward Peto had all the profit thereof for the residue of the year; and then an Ejectione firmæ being brought of the Land it self, will not lie; And therefore they endeavoured to prove, That Sir Edward Peto, being Lord of the said Manor, used every year after the Crop taken away, to feed the Meadow with Cattel, and to take the trees and bushes growing thereupon. But on the Plaintiffs part it was confessed, That they had only the first Crop. But that they used to hayn it sooner or later at their pleasure, and to keep it longer or shorter time uncut, according to the seasonableness of the year, which proves, That the Freehold was in them who had the first Crop. And of this opinion was all the Court, That properly, unless other matter be shewn to prove the contrary, the Freehold is in him who hath the first Tonsure; for that is the most beneficiall part of the year: And those who have the after Pasture, have but the profits in nature of Common: But admitting he hath but the first Crop, yet they held, That he may well have an Ejectione firmæ thereof. Yet the Court advised the Jury, That if they conceived the Vicars had only the first Crop, and not the intire profits throught all the year, as the evidence whereby the Defendants claim (which was a Lease in 29 Hen. 8. whereby he let the Rectory and Cythes, except the Parsons Hayn (which was the Land in question) for 42. years; and after a conveyance of the Parsons Hayn, 5 Ed. 6.) imports; then they should find this matter specially, and leave it to the Law, whether an Ejectione firmæ lies in this manner: But if they conceived the intire Land for all the year to be appertaining to the Vicars, then they might give a generall Verdict. And after wards the Jury found a generall Verdict for the Plaintiff.

Goldsmith *versus* Ellen Sydnor, Administratrix of William Sydnor.
Mich. 9 Car. rot.

4. **D**ebt upon an Obligation. The Defendant pleaded, That the said William Sydnor, the Intestate, 16. Maii 9 Carol. coram Roberto Heath, chief Justice of the Common Bench, concessit se teneri to Edward Hobert, in 400 l. to be paid at Pentecost next ensuing: Et si deficerit, &c. voluit & concessit per idem scriptum, quod incurreret super se, Hæredes, et Executores pœna in Statuto Stapul. &c. And further pleaded a Judgement against him in debts for two hundred pounds, at the Suit of Richard Hobert in the common

Common Bench; And that the said William Sydnor in his life did not pay the said debt of 400 l. nor any part thereof; and that the said Statute remains in his force; and that he hath not goods to be administered besides, to the value of 100 l. which are liable to the execution, upon the said Statute and Judgement, Et hoc parat. est, &c. The Plaintiff replies quod bene & verum est, That the said William Sydnor, by the said Recognisance concessit se teneri, to the said Edward Hobert, &c. but that there was a Defeasance betwixt them, That if he paid 100 l. to one Edward Leythorp upon the first of June 1635. and should save him harmless, &c. And that the said Statute should not be forfeited, And that the Defendant hath sufficient to satisfy the Plaintiff and the said Judgement. And hereupon the Defendant demurred. And it was now argued by Grimston, That this Statute, not being yet forfeited, is not pleadable, and relied upon the Case of Harrison, Co. lib. 5. fol. 28. But in this point the Court held, That there is a difference betwixt this Case and Harrison's, which was a Statute with a Defeasance for the performance of Covenants, which peradventure never should be broken; and therefore it shall be no plea to barre: But here is a Statute for the payment of money absolutely, at a day certain, which is allowable before debts upon an Obligation: But then Rolls for the Plaintiff took an exception to the Plea in Barr, That the pleading of the Statute was not good, because it is not said per scriptum suum Obligatorium, nec secundum formam Statuti, &c. And of this opinion was all the Court. Vid. Cok. lib. 4. fol. 64. Fullwoods Case; Wherefore for this cause Rule was given, That Judgement should be entered for the Plaintiff, unless good cause were shewn, &c. And afterward, upon a second motion, Judgement was given for the Plaintiff, for this insufficiency, and exception to the Plea in Barr, by Richardson, Jones, and Berkeley: But I conceived, That the Plea being but a Plea in Barr, and it being mentioned, That he acknowledged, If he failed of the payment, the penalty in the Statute Staple should incurr upon him; It cannot be intended, but to be a Statute acknowledged according to the form of the Statute of 23 Hen. 8. and the rather, because it is said quod post recognitionem prædictam, such a Defeasance was made: So he admits it to be a Recognisance: But notwithstanding it was adjudged for the Plaintiff.

Boreton *versus* Nicholls & alios, Pasch. 7 Car. rot. 115.

Error of a Judgement in the Common Bench in an Ejectione firmæ: The Case was. James Beck, Clerk, was seized in fee of Lands in Moreton-Henmarish, being the Lands in question, and had True Job his eldest Son and James his second Son, and by Indenture quinto Martii octavo Jacobi infeofss of those Tenements Sir Nicholas Overbury and others, to the uses in the Indenture,

viz. to the use of the said James Beck Clerk, the Father, for his life, without impeachment of Waste; and after, to the use of James Beck the second Son, for his life; remainder after his decease to the use of the first Son, of the said James Beck the Son, which should have Issue Male of his body, and to his Heirs for ever. And for want of such Issue, the remainder to the use of the first Daughter of the said James Beck the Son, which should have Issue of her body, and to her Heirs for ever. And for default of such Issue, the remainder thereof to the right Heirs of the said James Beck the Son for ever. They find, That James Beck Clerk, the Father, was seized for life; the remainder to James Beck his second Son for life; the remainder over, &c. prout. That the said James Beck Clerk, the Father, died seized, the said Job Beck being his Son and Heir: And that the said Job had Issue Henry Beck the Lessee, and died. That the said James Beck, Son of the said James Beck Clerk, entered after the death of his Father, and had Issue James Beck; and that the said James Beck the Grandson died without having Issue; And that the said James Beck, the Son, after the death of the said James Beck his Son, so seized, levied a fine of those Tenements *par cognissance de droit come ceo*, &c. with proclamation 21 Jac. to Richard Brett and William Wheeler, who entered by force of the said fine, and the said Henry Beck, the Son of Job Beck, entered upon them, and demised to the Plaintiff for years, upon whom the Defendant, by the command of the said Richard Brett and William Wheeler, entered and ousted the said Lessee; and that the said James Beck, Son of the said James Beck Clerk, is yet alive. Et si super totam materiam, &c. and upon this Verdict, after divers arguments in the Common Bench, it was adjudged for the Defendants, That this remainder to the younger Son, who should have Issue, is but a contingent Remainder, and a remainder to the right heirs, vested in James the Son; And that his fine is no cause of forfeiture: Nor that the said Henry, as heir of Job, might take advantage of the forfeiture. And this Judgement being removed by a Writ of Error into the Kings Bench, it being once argued at the Bar, without much difficulty, the Judgement was this Term affirmed.

Termino Trinitatis, anno decimo *Caroli* Regis,
in Banco Regis.

Burgesses Case.

One Burgesse being outlawed upon an Enditment of Manslaughter in the County of Middlesex, brought a Writ of Error to reverse the Outlawry, and assigned for error, That he was over the Seas at the time of the Outlawry, viz. at Utrick, in partibus transmarinis: Whereupon counsell being appointed for the Prisoner to plead, and the Error assigned, the Kings Attornee takes Issue, That he was here in Middlesex at the time of the Outlawry, and travellith his being at Utrick, prout: Whereupon Issue being joyned, and a Jury of Middlesex at the Barr the first day of this Term, Calchorp, being assigned of Counsell for the Prisoner for assignment of Error, offered in evidence a Certificate under the Seal of the said Town. Jones Justice moved it as doubtfull, Whether he might have Counsell upon his Triall, but all the other Justices held cleerly, That he shall have it, when the Triall is not upon the fact in the Enditment, but upon collaterall matter (viz. of his being beyond Seas.) And all the Justices held, That it is not materiall in what place beyond Seas he was, so as he was over the Seas; and that the Certificate under the Seal of the Town where he was resident without oath of the truth thereof, and one sworn for the exposition of it into English, is not allowable; but a Witness being sworn, said certainly, That he was there in service at the time of the Outlawry and before; Whereupon the Jury gave their Verdicts accordingly; and then he was instantly arraigned upon the Enditment, and pleaded, &c.

1.

The Case of Langforth Bridge.

Information against the Inhabitants of the County of Middlesex, for not repairing of Langforth Bridge, which by the Information was supposed to be an antient Bridge, and time out of mind had been used to be repaired by the Inhabitants of that County. The Defendants, protestando that it is not an antient Bridge; for plea say, That it lately was erected by the King for the benefit of his Mills; and hereupon Noy the Kings Attornee demurred, because he doth not answer, That it was an antient Bridge; but by protestation, which being the substance of the Information,

2.

ought to be especially answered or traversed. Secondly, That the County ought to maintain Bridges, because they be for the ease and benefit of the people, unless it be shewn who ought to repair them: And to that purpose he cited 10 Ed. 3. 28. and an ancient Record for Bow-Bridge 8 Ed. 2. in this Court, That the Jury found, It was to be repaired by the Abby of Dertfort, and 37. Assis. and a Record in 5 H. 5. in the Exchequer; Whereupon all the Court held the Plea to be ill, and Rule was given, that Judgement should be entred for the King, unless, &c.

Sir Edward Duncombs Case.

3. **S**IR Edw. Duncomb being indicted, For that there being an ancient high way in Barlesdon, he had inclosed his lands on both sides thereof, whereby he had straightned it, and the way was become Lutosa & founderosa; whereas by the Law of the Land he ought to have made it a sufficient way. Upon Not guilty pleaded, and evidence to the Jury at the Barr, it appeared to be a way betwixt two Lands ends in the common field, and that it was but four yards wide. But it was proved, That although he had made a Causey reasonable good at his own charge for Horse-men, yet Carts and Coaches might not passe, nor could meet for the straightness thereof, nor might goe besides the way. And although it was also proved, That by this charge he had made it better than it was before, yet because he had made the Hedges and the Inclosure in that manner, he at his perill ought to maintain the way: And whereas before the Parish was chargeable with the reparations, now by this inclosure he is bound to repair it and to make it a good way, and maintain it at his own charge and perill only. And Noy Attorney general said, It was so resolved in 6 Jac. and 19 Jac. upon conference with all the Justices of England, which Richardson chief Justice affirmed.

William Seagood *versus* Hone and Alice his Wife.
Mich. 8 Car. rot. 195.

4. **E**jectione firmæ, for Lands in Tuddington, of a Lease of Henry Seagood for three years. Upon Not guilty pleaded and special Verdict, the Case was, John Reve, Copyholder in Fee of the Manor of Tuddington (where the Custome was found to be, That any Copyholder might surrender out of Court into the hands of two Tenants, Copyholders of the Manor, to the use of any other) surrendered into the hands of two such Tenants of the Manor, the said Tenements, to the use of Francis Reve, and John Reve son of the said Francis, and of the longest liver of them both. And for want of Issue of the said John Reve the Son, of his body lawfully begotten, The Lands to remain to the younger Son of Mary Seagood, wife of William Seagood: This surrender not to stand and be

be in full force untill after the death of John Reve. John Reve died, . . . and the surrender was presented at the next Court; And Francis Reve, and John Reve son of the said Francis were admitted Tenants to them and the longer liver of them, and to the heirs of the body of the said John Reve the son, the remainder to the younger son of the said Mary Seagood. They also found, That Francis, and after John Reve, dyed without issue; and that Henry Seagood was the younger son of the said Mary, at the time of the surrender, who was admitted Tenant and entered and made a Lease for three years to the Plaintiff: And that the said Alice, wife to the Defendant, is heir to the said John Reve, and entered and ousted the Plaintiff. And if, &c. The first question was upon this clause, (This surrender not to stand and be in full force, until after the death of *John Reve*.) Whether the surrender be good, and that clause void? And it was resolved, That the surrender was good; and that clause (being repugnant to the premises) shall be rejected as void and idle, and shall not destroy the premises. The second question, Whether upon this surrender John had an Estate for life only, or an estate to him and his heirs of his body? And it was resolved, That John had but an Estate for life; and being an Estate for life limited by express limitation, it shall not be an Estate unto him higher by implication. And although peradventure, it might be further enlarged by implication in a devise, yet it shall not be so in a surrender or conveyance; in passing of which, the party ought or might have had sufficient counsel to direct him: Wherefore for the two first points, it was resolved for the Plaintiff by the opinion of all the four Justices. But for the manner of the finding, Jones doubted whether it should be a sufficient surrender to the use of the Plaintiff, Because the Verdict finds, That it is customary Land of the Banoz of Tuddington, and the surrender ought to have been into the hands of two Tenants of the Banoz. But the Copy of the surrender found, is in hæc verba, Tuddington in the margent, At the Court Baron of the Honour of Hampton, F. S. and F. D. Tenants of the Honour of Hampton, doe present, That *John Reve* did surrender into the hands of the two Tenants of the Honour, &c. ut supra. And that being a Court of the Honour, and into the hands of the Tenants of the Honour, is not good. But all the other three Justices held, It was good enough; For Tuddington being in the margent, It shall be said a distinct Court by it self: For an Honour consists of many Banoz, yet all the Courts for the Banoz are distinguished and have several Copyholders; And although there is for all the Banoz but one Court, yet they are quasi several and distinct Courts. And so it was usually in the time of the Abbeyes, That they kept but one Court for many Banoz: Whereupon it was adjudged for the Plaintiff.

Spirt *versus* Bence. Hill 8 Car. rot. 246.

5. **F**Rror of a Judgement in the Common Bench, in an Ejectione firmæ; ~~Where, upon a special Verdict, the Case was:~~ Thomas Cann, being seized in fee of divers Messuages and Lands holden in Socage, and having three Sons, Thomas, Francis, and Henry, deviseth his Lands in this manner. I Devise to *Thomas* my Lands in *Horton*, to him and his Heirs Males of his body; Remainder to *Francis* and his Heirs. *Item*, I give to *Francis* my Son, my house in *Wickwarr*, to him and to the heirs Males of his body. And for lack of such Issue, To my sonne *Henry* and the heirs Males of his body. *Item*, I give to my sonne *Henry*, and his heirs, freely my house in the Burrough of *Wickwarr*, in which I dwell. *Item*, I give unto my said sonne *Henry* my house and lands in *Impsteade*. *Item*, I give unto him two houses in *Wickwarr*, in the tenure of *f. s.* *Item*, I give unto the said *Henry* my pastures called the *South-fields*, and one Meadow called *Warhay* in *Wickware* (which are found to be the Land in question) yielding the rents and services therefore due. Also I will, That all Bargains, Grants, and Covenants which I have from *Nicholas Webb*, my sonne *Henry* shall enjoy, and his heirs for ever: And for lack of heirs of his body, To remain to my sonne *Francis* for ever. *Item*, I will, That my Wife *Margaret* shall have the use and keeping of my sonne *Henry*, and of all the premisses to him bequeathed, during her natural life, paying to him yearly for his maintenance eight pounds, trayning him up in learning, and what more of her owa pleasure. They find, That *Thom. Cann* the Devisor died 1576. That the Lands called *South-fields* and *Warhay*, are the Lands in the Declaration; And that they be not parcel of the Grants, and Bargains, which *Thomas Cann* had of *Nicholas Webb*. That *Tho. Cann* the sonne, had issue *Tho. Cann* the Lessor; That *Henry* entered into the Lands in the Declaration, and took the profits thereof, and was seized prout Lex, &c. And that afterwards the said *Henry* took to wife *Elizabeth*; And that in 38 Eliz. in the life of *Margaret* he infeoffed of the Lands in question *Rich. Lothington* and *George White*, and their Heirs, to the use of the said *Henry* and *Elizabeth* his Wife, and the heirs of their bodies; and after to the use of the heirs of *Henry*, with warranty to the feoffees and their heirs against all persons. Afterward, That *Margaret* dyed; And then *Henry* dyed without issue; and the said *Elizabeth* surviving, held her self in, &c. That *Thomas Cann* the Lessor was Cousin and heir of the said *Henry*, viz. sonne of *Thomas Cann*, sonne and heir of the said *Thomas Cann*, the heir of the Devisor, and was of full age of one and twenty years at the time of the death of *Henry*: And that after ward the said *Thomas Cann* entered, and made the Lease, in the Declaration mentioned: And that the said *Elizabeth* took to husband the said *Robert Spirt*, who thereupon reentered; And that the said *Elizabeth* is yet alive. Et si super totam, &c. And after

ter divers continuances, Judgement in the Common Bench was given for the Plaintiff. And of this Judgement a Writ of Error was brought, and the Error assigned in point of Law; and it was argued divers times at the Barre, viz. by Maynard, Mason, and Noy Attorney General for the Plaintiff in the Writ of Error, & by Germyn, Mallet and Calthorp for the Defendant. And in this Term it was openly argued at the Bench two severall dayes, viz. by Berkeley and my self the one day, and by Jones and Richardson on another day. Two questions were made and argued, first, whether Henry hath an estate for life only, by this Devise, in the Lands in question, or an estate Capl? For if he hath an Estate Capl, then it is a discontinuance, and Judgement cleerly ought to be given for the Defendant. And it was strongly urged, That the last clause in the Devise to Henry, where it is devised To him and his heirs; And for lack of heirs of his body, To remain to Francis and the heirs of his body, extends to all the clauses before, and makes him to have an estate Capl in all the Lands devised unto him. And one special reason offered, was, because he devised to Thomas and Francis, his eldest and second sons, Estates of inheritance: So he intended to give as great an Estate to his youngest Son; For by intendment, his affections is equall. Also the word Item couples them together, that he should have a great Estate in quality as the others. And against this point all the four Iudices argued and agreed, That Henry had but an Estate for life in the Land in question; And that the last clause, (And for lack of heirs of his Body) shall extend only to the Lands in that clause, viz. to the Bargains and Grants. And it is found, That it was not any part of the Bargains and Grants. They all agreed, That the words in a Will which disinherits the Heir at the Common Law ought to have an apparant intent, and not to be ambiguous and doubtfull; and that the intent ought to be collected out of the words of the Will, and not from any forrain intendment or averment: And therefore when he gave to Thomas in Tail, and in the second, to Francis in Tail, and in the third, to Henry in fee, and in the fourth, to Henry only: not mentioning any Estate, the Law shall construe it, That he shall have it but for life; and that he did not intend a greater estate. And for the word Also, it is no more than the word And, and shall not extend to the quantity of the estate, but to the clause following, That he deviseth, &c. And for that was relied upon the Books Co. 6. 16. Wilds Case and Coliers Case there: Vid. 22 Ed. 3. 16. 7 Ed. 6. Devise 38. 28 Hen. 8. Dy. 1. 34 Ed. 3. Avowry 158. Co. 9. 127. Sundays Case; Wherefore for this point they all agreed, That it was but an estate for life, and concluded with the Judgement in the Common Bench. Secondly, Whether this warrant be a Barre during the life of the Feme? It was objected that it was a Warrant, which commenced per disseisin, so as it cannot barre: For when Henry entred in the life of Margaret, it was a disseisin to her, and by consequence to him in Reversion. But in this point all the

Justices agreed, that it was no warranty which began by disseisin; for first it is doubtfull, whether the *Feme* had an estate for life, or only the Guardianship? And Berkeley held, That he was onely Guardian; but the others against him, Because the limitation is, She shall have it during her life. But although he hath title by that devise to have an Estate for life, yet it is not found that he ever was seized thereof; and therefore it cannot be a disseisin unto her. Also it is no warranty beginning by disseisin, Because Henry occupied from the death of Thomas Cann his Grandfather, and entred 1576. and it is not found, That he made any disseisin, nor had any such intention at the time of the entry by himself. Thirdly, Then the question is, If it be a good warranty and descends, whether it shall bind during the life of the *Feme*? And as to that point Richardson and Berkeley held, That it was a good warranty and should bind: But Jones and my self argued against it, First, Because the warranty never attached in the feoffees and *Cestuy que commeth* in in the post, and before the warranty attached; & therefore Jones denyed the resolution mentioned in Lincoln Colledge Case, Cok. 3. fol. 62. & 63. and said there was not any such resolution; And relied upon the Cases 22. Aff. 37. & 29 Aff. 34. That he that comes to Land in the post (as Lord of a Villain or Lord by Escheat, who enter before the warranty attached by descent) shall never have advantage of the warranty, which was not attached at the time of his entry; and upon that reason is Cok. lib. 1. fol. 125. Chudleys Case, He who hath an Estate executed by use, by the Statute of 27 Hen. 8. shall not have advantage of a warranty by *Voucher*, nor otherwise. The second reason, Because that the warranty eodem instante it was created, is destroyed; for instantly the Land returned to the feoffor, and is extinct quoad the Reversion clearly, because the Reversion is reversioned in him in a fee as high as he gave it. And it is also determined quoad the Baron himself for the present Estate; for the warranty hath no essence, or being in him to have benefit by *Voucher* or *rebutter*: Therefore it shall have no essence quoad the *Feme*. And although it should be held, that, Coke lib. 3. fol. 62. Lincoln Colledge Case should be Law, yet this differs from that Case; for there he who recovered against Tenant in Tail, obtained a Lease with warranty from an Ancestor collaterall, and made a feoffment to uses, and there the warranty was created, and did extend to the estate before the feoffment. But here the warranty begins with the feoffment to uses; And the feoffee himself may never have benefit thereof by *Voucher* or *rebutter*, and instantly with the creation is destroyed: And therefore compared it to the Case 40 Ed. 3. 14. 11 H. 4. 4. 20 H. 6. 29. Where one makes a feoffment with warranty, and after ward takes again by feoffment, The warranty is determined, because he hath as great an estate as he gave. But Richardson and Berkeley argued, Although the warranty is determined for the Inheritance, and shall not bind the husband for the present estate; yet it is good, and shall be continued for the *Feme*; and therefore quoad her

her estate, shall be said to have continuance; and in proof thereof these cases were urged, 17 Ed. 3. 47. 39 Ed. 3. 9. 31 Ed. 3. Voucher 25. Where the Baron made a feoffment with warranty against all persons, and takes back an estate to him and his wife, and to a Stranger, and to the right heirs of the Baron, The Warranty is determined quoad the Fee simple, but it is in esse, quoad the Estate of the wife, and quoad the Stranger. But to these Cases it was answered. That they be not like to the Case in question, because there the warranty was well created and vested in the Feoffee, and is annexed to his estate, and he was entitled to the benefit of it by Voucher or Rebutter; and when he took back the Estate, it vested in him as Assignee in the per, and not in the post, which is the reason of the Case 31 Ed. 3. Where a fine was levied with warranty to the Conuser, his heirs and Assignes; who renders by the same fine to the Conuser and his wife, That he shall have benefit by this warranty by Voucher, although it returns eodem instanti; for the Estate is given by the render, and he is in the per, but so it is not here. And although it was alledged, That every one coming in of any Estate may rebut by the warranty attached upon the Land, yet as this Case is, because he comes in the post, before the warranty attached, he shall not have benefit thereof; And therefore Jones cited a Case 7 Eliz. in the Common Bench, Where one made a feoffment with warranty, to the use of himself for life, remainder for life, remainder to his right heirs, That it was resolved this warranty should not bind, for the remainder to have benefit thereof. The third reason was made by Jones and my self, That a feoffment with warranty being by Tenant for life, to barre the Reversion, is not favoured in Law. And when it is to the use of himself and his wife, and to the use of his right heirs, the warranty is destroyed quoad him who created it, and never by any means may bind him in his life. And when the Ancestor is not bound thereby, his heirs may not be bound, as Litt. sect. 735. Uncle of Tenant in Capl being infeoffed, makes a devise with warranty, which descends upon the Issue in tail, it shall not bind, because it is a Maxim, That the Heir is not bound where the Ancestor is not bound himself; and to that purpose was cited 31 Ed. 3. grants 85. A Father binds his heirs where he doth not bind himself; It is void to bind the heir, Co. Litt. 386. Wherefore for this point, the Court being divided, Adjournatur.

Sir Henry Ferrers Case.

SIR Henry Ferrers, Baronet, was indicted by the name of Sir Henry Ferrers, Knight, for the murder of one Stone, whom one Nightingale feloniously murdered, and that the said Sir Henry was present, aiding and abetting, &c. Upon this Indictment Sir Henry Ferrers being arraigned, said, That he was never knight-

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ted, which being confessed, the Enditment was held not to be sufficient; wherefore he was endited de novo, by the name of Sir Henry Ferrers, Baronet; and being arraigned pleaded Not guilty, and was tried at the Barre; and upon the evidence it appeared, That he was arrested for debt, and that Nightingale his Servant in seeking to rescue him, as was pretended, killed the said Stone: But because the Warrant to arrest him was by the name of Henry Ferrers, Knight, and he never was a Knight, it was held by all the Court, That it was a variance in an essentiall part of the name, and they had no authorizty by that Warrant to arrest Sir Henry Ferrers Baronet: So it is an ill Warrant, and the killing of an Officer in executing that Warrant cannot be murder, because no good Warrant. But upon the evidence it appeared cleerly, That Sir Henry Ferrers upon the arrest obeyed, and was put into an House before the fighting, betwixt the Officer and his Servant; wherefore he was found Not guilty of the Murder and Manslaughter.

Dorchester *versus* Webb. Mic. 9 Car. rot. 373.

7.

DEbt, by Anne Dorchester, Executrix of Anne Rowe, upon an Obligation of 260 l. by William Webb. The Defendant pleaded, That John Dorchester, late husband to the said Anne; and the said William Webb were obliged in this Bond joyntly and severally to the said Anne Rowe; and that the said John Dorchester died, and made the said Anne his Wife the now plaintiff, and the said Anne Rowe the Obligee his Executrices; and that the said Anne Rowe renounced, and the said Anne Dorchester administered, and that *Affers* to pay the said Debt came to the Plaintiff, Et hoc, &c. The Plaintiff confessed the Will of John Dorchester. And that the said Anne Rowe renounced, And that the said Anne Dorchester fully administered all the Goods of John Dorchester; And after the said Anne Rowe made the Plaintiff her Executrix, And that neither at the death of the said Anne Rowe, nec unquam postea, any goods of the said John Dorchester came to the hands of the Plaintiff. And upon this the Defendant demurred; and it was argued by Sir John Banks and Grimston for the Defendant, and by Calthorp and Serjeant Ward for the Plaintiff: And the Defendant much insisted, That when the Obligee makes the Obligor his Executor, it is a release in Law of the Debt, and so it is when he makes one of the Obligors his Executor; for a release to one is a release to both. And by the same reason when the Obligee makes the Executor of one of the Obligors, who is chargeable to that Debt, his Executor, It is a release in Law of that Debt; for he may not sue himself, nor his Companion: And although it be pleaded, That he fully administered the goods of John Dorchester yet that is not materiall, nor alters the Case; for he remains alwaies the Executrix of John Dorchester, and may have the goods of the said

said John Dorchester: And for that purpose cited Mary Shepleys Case, Co. 8. fol. 134. That if an Executrix pleads plene administravit, the Plaintiff may take Judgement presently, and expect when he hath Assets: But Jones, Berkeley, and my self (Richardson being absent) agreed, That the Defendant hath no cause of demurrer, but that Judgement shall be given for the Plaintiff. First we agreed, That when the Debtee make the Debtor his Executor, it is not absolutely a discharge of the Debt; for the Debt remains as Assets in the hands of the Debtor Executor, and is quasi a release in Law, because he cannot be sued, but it is a meere suspension of the Action, where the Feme Debtee takes the Debtor to Husband, or if a man Debtee takes the Debtor to Wife, That is a release in Law, because they may not be sued, and personall Actions once suspended are perpetually suspended; But where the Executor of the Debtor is made Executor to the Debtee, he hath nothing thereby in his own right, but is only to use an Action in the right of another: And although he be Executrix to John Dorchester, yet when he hath fully administrated all the Estate of the said John Dorchester, before he be made Executrix to Anne Rowe, he hath in a manner discharged her self of being Executrix to John Dorchester, and hath not any thing of his Estate. And they denyed the Law to be as it is cited in Shepleys Case, That if an Executor pleads plene administravit, the Plaintiff may pray Judgement against him, when Assets comes unto him; but the Plaintiff is to be barred if he acknowledge it; and if he deny that he hath not fully administrated, which is found against him, he shall be barred also, and pay costs to the Defendant: But the difference is, when it is found, That the Defendant hath some Assets, although of little value, so as he hath not fully administrated. The Plaintiff shall have Judgement for the intire Debt, but he shall not have execution, but of as much as is found, and shall not be barred for the residue; and if more Assets come afterwards, he may have a Scire facias to have execution thereof; but if it be found, That he hath fully administrated, or if it be so pleaded and confessed, the Judgement shall be against the Plaintiff, and so are all the precedents; wherefore here, he having fully administrated all the goods of John Dorchester, and not being chargeable to that Debt, as Executrix to John Dorchester, he as Executrix of the said Anne Rowe may maintain this Action against the said Webb the other Obligor; Wherefore it was adjudged for the Plaintiff. Vid. 8 Ed. 4. 3. 20 Ed. 4. 17. 21 Ed. 4. 81. 21 Hen. 7. 31. 11 Hen. 4. 83. 11 Hen. 7. 4. Coke lib. 8. fol. 136. Sir John Needhams Case.

Sir William Wallers Case.

Sir William Waller was endited, for that he in the Palace of Westminster neer the great Hall, the Justices in the Kings Bench, Chancery, and Common Bench, Judicially sitting to hear

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causes, made an Assault and Affray upon Sir Thomas Reignolds, and beat him, in disturbance of the Law and contempt to the King, &c. and upon this, being arraigned and found guilty, Because the Enditement was not, That he did it in the presence of the Justices, nor in the presence of the King, all the Judges agreed, That the Judgement of the cutting off his hand should not be given, and so, seriatim, they delivered their opinions: But because this offence was in the Palace near the Hall doze, whereby tumults might have been made; and because it was found to be done, sitting all the Courts, and in disturbance of Justice and the Law, and in contempt to the King, the Court awarded, That he should be imprisoned for the said offence, during the Kings pleasure, and should pay one thousand pounds fine, by the opinion of Richardson chief Justice, Jones, and Berkeley: And Jones and Berkeley would have parcell of the Judgement to have been, That he should make his submission in all the Courts of the Kings Bench, Chancery, and Common Bench, because the offence was made to the said Courts: But Richardson and I did not agree thereto, because there never was any such Judgement before, and for the fine I conceived that 500 l. was sufficient, and it was awarded, That he should be bound with sureties to his good behaviour. Vide 22 Ed. 3. 13. 39. Ass. 1. 19 Ed. 3. Judgement 17. 41 Ed. 3. Corone 280. 42 Ass. 18. 41 Ass. 25. Dy. 188. Stanford fol. 38. Trin. 19 Ed. 3. rot. 55. Carus case 37 Eliz. Striking at the Court of Wards Stays, only Imprisonment and fine, Hill. 17 Eliz. rot. 6. inter placita Reg. Thomas Joans Endicted for Murder, apud le new Pallace Westm. 24 January an. 17 Eliz. cognovit judicium manus amputatur. But it is not expressed, sedente Curia.

Termino Michaelis, anno decimo Caroli Regis,
in Banco Regis.

M*emorandum.* In the Vacation, viz. in August 1634. *William Noy* (Attorney General) died at his house in *Brainford*, in the County of *Middlesex*: And *Sir Edward Coke* (who was Attorney Generall to *Queen Elizabeth* and to *King James*, and afterwards chief Justice of the Common Bench, and then chief Justice of the Kings Bench, and in 14 *Jacobi* discharged of that place) died at his house in *Stoke*, in the County of *Buck.* in September 1634. being a prudent, grave, and learned man in the Common Laws of this Realm, and of a pious and vertuous life. He died in the eighty second year of his age. And in the same Vacation, viz. 14. September The King at *Hampton Court* discharged and removed *Sir Robert Heath* from his place of chief Justice of the Common Bench, and within two dayes after, appointed *Sir John Fynch* of *Grays-Inne* who was of the Kings learned Councell, and Attorney to *Henrietta Maria* the Queen) to be Serjeant at Law and chief Justice of the said Court. Who the first day of this Term came unto the Chancery Barre, where, after a Speech made by the Lord *Coventry* Keeper of the Great Seal, and his answer thereunto, was sworn Serjeant at Law: And upon Monday (being the day of *Esloyns* of *Quindena Mich.*) appeared at the Common Bench Barre, clad and attired in his party coloured Robes and Habillaments of a Serjeant at Law, and counted upon a Writ of Right, *de precepto in Capite*, brought by the said Queen against *Henry* Earl of *Holland*, chief Justice and Justice in Eyre of all the Kings Forests, Chases, Parks, and Warrens *citra Trent*; and Steward of all the Queens Courts, &c. And the said *Sir John Fynch* gave Rings, *quorum Inscriptio fuit, Rosa et Lilia dant purpuram*, and kept his Feast; and the next day, being Thursday the 16. of October, was sworn chief Justice of the Common Bench: And upon the Saturday following, arrayed in his Judges Robes and accompanied by the Earls of *Dorset*, *Holland*, *Newport*, and fourty other of Nobles, Knights, and Esquires (the Society of *Grays-Inne*, and Inns of Chancery and Officers of the Court attending him) was so brought unto the said Court.

And note that the foresaid *Sir Rob. Heath* appeared at the Common Bench Barre the first day of this Term; and, being in his place of junior Serjeant at Law, pleaded for his Clyents as Serjeant at Law: Which was done by the Kings special command, upon his humble Petition to his Majesty; who, by advice of the Lords of his Councell, granted him leave to practise there, and in all other his Courts at *Westminster*, excepting the Star-Chamber only.

And in this Vacation *Sir John Banks* (Reader of *Grays-Inne*) and the

the Princes Atturney) was sworn Atturney General: And Sir Richard Sheldon the Kings Solicitor resigned up his place, having obtained a new Patent, to be one of the Kings learned Councel, with the same Fee he had before (*vi^z. 70 li. per annum*) and with a privie Seal to have precedency before the Kings Solicitor. And Edward Littleton of the Inner-Temple (Recorder of London) was made the Kings Solicitor.

Tylley *versus* Peirce. Pasch. 10 Car. rot. 306.

2. **D**Ebt, upon an Obligation of 600 l. conditioned, Whereas the Defendant was to espouse A. S. a Widow: If the Marriage took effect, and he should survive the said A. S. That if within three moneths after his decease there were paid to the said Obligees 300 l. to and for such uses and purposes as the said A. S. by any Writing under her Hand and Seal subscribed and published in the presence of two witnesses, should nominate, declare, and appoint, Then, &c. The Defendant pleaded, That he did not limit, declare, or appoint any use or purpose for the imployment of that money. The Plaintiff replies, That he by her Will in writing, sealed and published by her in the presence of two witnesses (naming their names) did thereby will and appoint such summs to be paid, And that the Defendant had not paid them. Whereupon the Defendant demurred. And now Rolls for the Defendant shewed the cause, For that he ought to have made a Deed in Writing, and not a Will, first, Because it was not to have any effect untill after her death, and it was ambulatory and revocable; and a Feme Covert may not make any Will. But the Court (Jones being absent) held, That this Declaration was good: For although a Feme Covert may not make a Will without her Husbands assent, yet that Declaration in form of a Will, is good enough: And thereupon Richardson cited a Case to be adjudged in the Common Bench when he was chief Justice there, upon a Conveyance, Wherein was a Proviso, that one might revoke the uses by writing under his hand and seal, That a revocation by Will under his hand and seal, was adjudged a good revocation: And although the pleading was here, That the said A. S. voluit & devisavit, & not that it was appointed by her, yet the Court held it to be well enough: For it is not properly a Will, being made by a Feme Covert; but a Writing in nature of a Will: Wherefore Rule was given, That Judgement should be entred for the Plaintiff, unless other cause, &c.

Holmes Case.

3. **W**illiam Holmes was endicted in London, for that he in April 7 Caroli, being possessed of an house in London in Throgmerton Street, in such a Ward for six years, remainder to Joh. S. for 3. years, the Reversion to the Corporation of Haberdashers in Fee.

fee; *De vi et armis* 3. April. *ſi primo Caroli*, the ſaid houſe felonice, voluntarie, et malicioſe, igne combuſſit, ea intentione, ad eandem domum manſionalem, nec non diverſas alias domus manſionales diverſorum Leigeorum Domini Regis; adtunc et ibidem ſcituat. et exiſtent. ad dictum domum manſionalem dicti *Willielmi Holms* contigue adjacent. adtunc et ibidem felonice, voluntarie, et malicioſe totaliter comburendo et igne conſumendo contra pacem. And upon this being arraigned at Newgate, he was found guilty: And beſore Judgement, this *Edictment* was removed by *Cerciorari* into this Court. And it was argued at the Barre by *Grimston*, That it was not felony. And now this Term at the Bench, and by *Richardſon*, chief Juſtice *Jones*, and *Berkeley*, it was held, That it was not felony to burn an houſe whereof he is in poſſeſſion, by virtue of a Leaſe for years: For they ſaid, That burning of houſes is not felony, unleſs that they were *ædes alienæ*: And therefore *Britton fol. 16.* et *Bracton fol. 146.* et 27. *Aſſ. 44.* mentions, That it is felony to burn the houſe of another, and 10 *Ed. 4. 14. 3 H. 7. 10.* et 10 *H. 7. 1.* et *Cok. lib. 11. fol. 29.* *Poulterers Caſe*, which ſay, That burning of houſes generally is felony, are to be intended *de ædibus alienis*, et non propriis: And although the *Endictment* be ea intentione ad comburendum felonice, voluntarie, et malicioſe, the houſes of divers others contigue adjacentes, yet intent only without fact, is not felony. Alſo *Berkeley* and *Jones* held, That it cannot be ſaid to be *vi et armis*, when it is in his own poſſeſſion. Alſo *Jones* ſaid, That he could not be well endicted of felony, becauſe none of their names are mentioned who be the owners of the houſes adjoining. But to that objection *Berkeley* and *Richardſon* agreed not. But I argued that the burning in the *Endictment* mentioned, is felony, becauſe it is capitale crimen, ſelleo animo perpetratum, which is the definition of felony in *Cok. Lit. 39.* Alſo by the rule in *Bracton 146.* *Quod incendium nequitur, et ob inimicitias, capitali pœna puniatur; Si vero ſit incendium fortuito vel per negligentiam, et non mala conſcientia, non ſic puniatur; ſed verſus eum criminaliter agatur.* And it cannot be ſaid to be by negligence in anothers houſe; wherefore it is to be intended in his own houſe. Alſo this burning is found to be malicioſe, ſo it is mala conſcientia et nequitur factum. Alſo this burning of his houſe in a ſtreet of the City, adjoining to the houſes of others, is to be the indangering of the City, and therefore ought to be conſtrued to be felony; but ſo peradventure is not the burning of his houſe in the fields. And whereas it was ſaid, That the intention cannot make a felony, it was answered, That the intention here is coupled with an act of burning, and with the intendment of an act, which is felony, as 5 *H. 7. 18.* 7 *H. 7. 42.* 13 *Ed. 4. 9.* Where a man delivers goods to one, and afterwards he that delivered them, privately ſteals them, to the intent to charge him, &c. 'tis felony. And whereas 'twas objected, That being his own poſſeſſion, it cannot be ſaid *vi et armis*: I answered, That *vi et armis* is well enough, where there is a *Violence*, as it is

in an action upon the Case. Vide Co. lib. 9. fol. 50. Also every Endowment is *vi et armis et contra pacem*, where an act is done against the Commonwealth. So is it where a servant runs away with goods committed to his trust above forty shillings, although properly it cannot be said to be *vi et armis*, because they were in his custody. And in this case the ill consequence which might have fallen out by this act, makes the offence the greater; and the books in 10 Ed. 4. 14. 3 H. 7. 10. 11 H. 7. 1. & Stanford 36. Co. 11. 29. Co. 4. 20. put the case of burning of houses generally, and not of the burning of other mens houses. And it is an equal mischief in a Commonwealth, to burn his own in a City or Vill, as to burn the houses of others, for the danger which may ensue. But the other three Justices resolved *ut supra*, that it was not felony; wherefore he was discharged thereof. But because it was an exorbitant offence, and found, they ordered, that he should be fined 50 l. to the King, and imprisoned during the Kings pleasure, and should stand upon the Pillory with a paper upon his head, signifying the offence, at Westminster and at Cheapside, upon the Market day, and in the place where he committed the offence, and should be bound with good Sureties to his good behaviour during life.

Robodham *versus* Venleck.

4.

Action for words. Whereas the Plaintiff exhibited in the Kings Bench Articles of the good behaviour against the Defendant, and made oath before Justice Whillock (one of the Justices of the said Court) of the truth of them, that the Defendant spake these words of the Plaintiff, He (innuendo the Plaintiff) made a false Oath (innuendo the Oath aforesaid) before the Judge, (innuendo the said Justice) and I have that in my house, that can prove it. After Not guilty, and found for the Plaintiff, it was moved by Ball, that for these words an Action lies not, Because he doth not shew, there was any speech of the Plaintiff before, nor of that Oath: Also he doth not shew it to be a false Oath taken in any Court. But (absente Richardson) Jones, Berkeley, and my self held, that the Action well lies: For when it is alledged to be spoken falsely of the Plaintiff, that is sufficient without shewing, there was any speech of him. And when it was shewed, that Articles for the good behaviour were exhibited in the Kings Bench, and he sworn to the truth of them before Justice Whillock, and he affirmed that this Oath is false, This is a scandalous speech, and charges him with perjury: For it is an Oath taken in a Court of Record; and it is not like to the Case alledged, That thou wert forsworn in Whitechurch Court: For this Court hath no cognisance, that Whitechurch is a Court of Record. And here, when the Defendant hath pleaded Not guilty, and found guilty, that ascertains the Court, he spake those words of the Plaintiff, and concerning that Oath; Wherefore it was adjudged for the Plaintiff.

Merrick

Merrick *versus* Hundred de Rapelgate in Com. Glouc.
Pasch. 10 Car. rot. 233.

ERror of a Judgement in the Common Bench: For that the Plaintiff had brought his Action against the Hundred upon the Statute of Winton 13 Ed. 2. of Hue and Cry, and the Statute of 27 Eliz. and County, That he was robbed in S. in loco vocat. the Highway, leading from L. unto Glocest. of such a summe, by persons unknown: And that he made Hue and Cry at Cotesford, in the said County, neer to the said place, where he was robbed, and gave notice of the said Robbery to the Inhabitants of Cotesford aforesaid: And that he was sworn accordingly before such a Justice of the Peace, That he was robbed of such a summe, and did not know any of the parties. And upon Not guilty pleaded, and found for the Plaintiff in the Common Bench, and Judgement there, Error was brought and assigned by Sir John Banks Attorney generall; Because he doth not alledge, that Cotesford was a Vill within the Hundred; so as notice was given to the Inhabitants within the Hundred, where the Robbery was committed: For to give it to any of the Villages of another Hundred, is not within the intention of the Statute: For they will not regard it; because they shall not be charged with the losse. But all the Justices held, That it is not materiaill it should be given to those of the Hundred, but to the Inhabitants of the Vill neer adjoining, to the place where the Robbery was committed; For the words of the Statute do not mention, That notice shall be given to the Inhabitants of the Hundred: And Henden Serjeant said, it hath been adjudged, That Hue and Cry made, and notice given to the Inhabitants of the Vill aqes neer adjoining to the place where the Robbery was done, although it be out of the Hundred and County, was good enough. But all the Justices doubted thereof, if out of the County; But although it were in a place in another Hundred it were well enough; For by intendment the party robbed, cannot know the Division of the Hundreds: But he ought at his perill to make it, in a Village neer adjoining to the place, where he was robbed; Whereupon the Judgement was affirmed. Crawley Justice said, That in the Common Bench in an Action against the Hundred of Daccorn, upon a speciall Verdict, It was adjudged, That Hue and Cry made in the next Vill adjoining, although it were in another County, was adjudged good. Quod vide antea fol. 41.

5.

Stevens *versus* Facone. Hill. 9 Car. rot. 1052.

ERror of a Judgement in the Common Bench, in Quare impedit. Faucon had brought a Quare impedit against George late Archbishop of Canterbury, and the said Stevens for the Church of Newington in the County of Surrey, where the Plaintiff intituled himself

6.

himself by grant of the next avoidance: And that one Tobias Crisp was presented, admitted, instituted and inducted thereto, and that the said Church became void, by the acceptance of a second Benefice above value. The said Archbishop pleaded a Plea thereunto; Whereupon it was Demurred. And Stevens pleaded a Plea and traverseth, That the said Tobias Crisp was admitted and instituted therein: And upon this, they were at Issue, and a Writ awarded to the Archbishop for that Triall; But afterwards, upon consideration of the said Plea of Stevens, It was adjudged an ill Plea, and Repleader was awarded, because the induction being alledged, ought also to have been traversed; Wherefore the Defendant amended his Plea, and traversed the admission, institution and induction, and Issue was joyned thereupon, and tried for the Plaintiff. And after divers continuances and dapes in Banco, the Plaintiff shewed, That the Archbishop was dead since the last continuance, and prayed that there might be no further proceedings as against him, and to have Judgement against the Defendant Stevens upon the Verdict, which was granted him, and non Error brought. The first Error assigned, was, That the replying was not well awarded; For the Issue which was joyned before the Writ awarded to the Archbishop, was well enough, and needed not any Repleader. But all the Court here held, That the Repleader was well awarded: For the induction being alledged as well as the institution, there ought to be a Travers to it, which alters the course of the Triall, as 22 H.6.27. & 2 H.4.17. are. So as it shall be tried *per pais*. The second Error assigned, was, That where the Allegation was, that the Archbishop was dead, and the Judgement Ideo consideratum fuit, That he should recover only, against the said Stevens, &c. It was not good; Because it is not entred, Et quia *le dit Stevens*, hoc non dedicit, ideo consideratum est, &c. For untill the other party confesse or deny it, upon a surmise only of the part of the Plaintiff, without the Defendants joyning, the Court ought not to give Judgement; Wherefore for this cause it is Erronious. But all the Court held, That it was well enough; For the Archbishop being surmised to be dead, And the other Defendant by Triall of the Issue against him, being out of Court, either to count, plead, or confesse it, the Court shall adjudge thereupon, according to the surmise of the Plaintiff, and shall proceed to Judgement against the Defendant only; Wherefore the Judgement was affirmed.

Anonymus.

7. **E**ndicement against J. S. and twenty seven others of Cheshwick. For that they engrossed magnam quantitatem Straminis et Foeni apud Cheshwick, with an intent to sell it and make it the dearer. And it was moved by Robert Hide, That this Endicement was not sufficient; because he doth not say, that quilibet eorum ingrossed, for

for twenty eight may not ingrosse together. Sed non allocatur; for it may be that twenty eight may ingrosse and sell together, though it be not probable. The second exception, was, Because it is said, That they ingrossed 13. Jan. 9 Car. & 10. Maii 10 Car. at Cheswick, magnam quantitatem Straminis & Fœni, which is altogether uncertain, not mentioning how many Loads of Hay and how many of Straw they ingrossed: And for that cause the Endiament was quashed.

Stile versus Finch.

Action for words, and declares, They were spoken 2 Car. And the Defendant pleaded Not guilty, and found against him. And now Adams moved in arrest of Judgement, That the Action is brought for words spoken so long time past, viz. six years before the Action commenced; so that by the Statute of Limitations he was debarred of this Action; and therefore the Court ought not to give Judgement upon this Verdict for the Plaintiff. But Jones and Berkeley held, That the Plaintiff ought to have Judgement; because the Defendant hath not pleaded the Statute of Limitations: for there may be divers causes, that he could not bring the Action before this time. viz. That he was in Prison, or within age, or beyond Seas, or that he had sued the Defendant to Outlawry, and the Defendant had reversed the Outlawry, and this Action brought within a year after the reversing of the Outlawry (as in truth the case was) for then the Action is well brought. But Adams moved, That he should have shewn it in his Declaration. But it was adjudged for the Plaintiff.

8.

Stonehouse versus Corbett;

Error of a Judgement in Waste, in the Com. Bench: The Error assigned, was, That divers Wastes being alledged, to some of them the Defendant pleaded *Null Wast fact;* To others he pleaded justifiable Waste; To a third he pleaded a Plea in excuse of the Wast, And upon these pleas, issues were joyned, and a Venire facias awarded, reciting the issues, and commanding a Jury to be returned to inquire if the Defendant did commit the waste, as the Plaintiff hath declared. And for this cause Rolls assigned it for Error; Because they ought to have inquired of the severall issues, as they be joyned: But because that divers Venire facias's were in this manner: And the inquiry, if waste be made as the Plaintiff hath declared, implies, That they shall inquire according to the severall issues, If the waste were in such manner as the Plaintiff hath declared; otherwise the Verdict should be against him. The Court held it to be good enough, and no Error; wherefore rule was given to affirm the Judgement.

9.

Houell *versus* Barnes, in Chancery.

10. **U**Pon a Suit in Chancery, A Case was agreed by the Counsell of both parties and referred to Justice *Fones, Berkeley*, and my self, to consider and certifie our opinions. The Case was, One *Francis Barnes* seised of Land in Fee deviseth it to his Wife for her life, and afterwards orders the same to be sold by his Executors here under named, and the monies thereof coming, to be divided amongst his Nephews. And of the said Will, made *William Clerk* and *Robert Chesly* his Executors, *William Clerk* dies, the Wife is yet alive: Two questions were made. First, Whether the said *W. C.* and *R. Ch.* had an interest by this devise, or but an authority? Secondly, Whether the surviving Executor hath any authority to sell? We all resolved, That they have not any interest by this devise, but only an authority. Secondly, That the surviving Executor notwithstanding the death of his companion may sell; And so we certified our opinions. Put whether he might sell the Reversion immediately, or ought to stay untill the death of the *Feme*, was a doubt. *Vid. 30 H. 8. Br. Devise 31. 9 Ed. 3. 16. Cok. Lit. 112, 113. 136, 181, 8. Ass. 26.*

Peard *versus* Johnes.

11. **A**Ction for words. Whereas the Plaintiff was of the Middle-Temple for divers years, and called to the Barre, and gave Counsell to divers the Kings Subjects, and practised the Law, and had married the daughter of *J. S.* That the Defendant having communication with the said *J. S.* concerning the Plaintiff and the marriage of his daughter, said of the Plaintiff. He is a Duncce, and will get little by the Law. To which words, the said *J. S.* answering, That others have a better opinion of him, He replied He was never but accounted a Duncce in the Middle Temple. The Defendant pleaded Not guilty, and found against him, and damages to 100 marks. Bing Serjeant moved in arrest of Judgement, That these words be not actionable; For an Action lies not, for calling one Duncce; For Duncce was a great learned man, and he was thereby compared unto him, and then no discredit: And Duncce is commonly spoken of one who is dull and heavy of wit, and though not so ready and nimble as others, yet he may be of a solid Judgement; Wherefore they seem not words of discredit. And to say, He will not get much by the Law, that maybe, because he will not give himself to practise. But all the Court, seriatim, delivered their opinions, That the Action well lies; For the words are to be intended according to the common speech: And Duncce in common intendment and speech, is taken for one of dull capacity and apprehension, and not fit for a Lawyer, and words shall be taken in such sense as they are spoken, and they are alledged to be spoken maliciously, and to the intent to slander him in his Profession:

cession: And so upon Not guilty pleaded, it is found, That he spake them maliciously: And for the words, that he will not get much by the Law; It is not to be intended, That he hath no will to practise, and to gain by his Profession: But he will not gain, viz. he will not deserve to gain, &c. Wherefore it was adjudged for the Plaintiff.

Morgans Case.

Morgan and two others were indicted for counterfeiting twenty shilling pieces of the Kings Coyne, and Morgan for offering these pieces to the Kings Subjects, knowing them to be counterfeit. And being thereupon arraigned, he pleaded Not guilty. And the evidence being pregnant against Morgan, he was found guilty, and the others were acquitted: And Judgement given, That he should be drawn and hanged; but not to be quartered, according to the opinion of Stanford 182. 12.

Beale *versus* Beale.

Debt upon an Obligation, conditioned for the performance of the Arbitrament of J. S. so as the same be delivered upon the 28. of February following, at the Shop of John Rolf Scrivener in Cornhill, &c. The Defendant pleaded *Nol tiel arbitrament*. The Plaintiff shews an Arbitrament 27. February, and what; And that he delivered it at the Shop of John Rolf Scrivener in Cornhill; and shews the breach. And upon this the Defendant demurred. One cause assigned by Grimston, was, For that the Arbitrament is said to be delivered the 27th. of February, and not the 28th. of February, nor is it averred to be delivered at the foresaid Shop, nor to the foresaid John Rolf. And it may be he hath removed his Shop, and then it is not intended, it should be delivered at the new Shop; or there may be another John Rolf. Sed non allocatur: For it shall not be intended another person nor another Shop, unless the contrary had been shewn. Secondly, Because the Arbitrament was uncertain, viz. to pay the charges in such a Suit. Sed non allocatur; For they are certain enough, when the Attorney hath made a Bill of charges: Wherefore it was adjudged for the Plaintiff. 13.

Langden *versus* Stokes.

A Sumpsit. Whereas the Defendant, 2 Apr. 9 Car. (for such a valuable consideration) assumed to go such a voyage in such a Ship before August following, and alledges a breach in the non performance. The Defendant pleaded, That before any breach, the Plaintiff, the fourth of April at such a place, exoneravit him of the said promise. Whereupon the Plaintiff demurred. And now 14.

now Rolls for the Plaintiff alledged, That this pleading a discharge, without shewing how, was not good: and he cited divers books, 22 Ed. 4. 40. Quod indemnium conseruet, or exonerabit, is no Plea. But Maynard for the Defendant argued to the contrary, That for as much as this was an Action grounded upon a Promise by words, it may be discharged by words, before the breach thereof; and therefore exoneravit generally is a good Plea: And he cited for this 3 H. 6. 36. And of this opinion was all the Court (absente Berkeley.) And Richardson said, That he knew it had been so resolved divers times; and the Rule was remembred, Eodem modo quo oritur, eodem modo dissolvitur: Wherefore it was adjudged for the Defendant, quod querens nihil cap. per billam.

King *versus* Coke. Pasc. 10 Car. rot.

15. **T** Respass. Quare clausum fregit pedibus ambulando et averis depasc. &c. The Defendant justifies, because the place where, &c. tempore quo, &c. fuit solum et liberum tenementum of John Marques of Winchester, and so justifies by his command. The Plaintiff replies, That this Land is parcel of the Manor of Abbots-Anns, and that William Marques of Winchester was seized in fee of the said Manor, and leyped a fine thereof to the use of himself and Lucie his Wife, for their lives, the Remainder to the Lord Edward Pawlet for an hundred years, if he lived so long. William Lord Marques died, and Lucy his Wife died; And that Edward Lord Pawlet entred, and let to him for one and twenty years; who entred and put in his Cattle, and abers the life of the said Edward Lord Pawlet. Et hoc, &c. And hereupon it was demurred, because this Replication doth not answer nor confels and avoid the Freehold of the said John Marques of Winchester, alledged in the barre. But all the Court held, That the barre being a barre at large, the title in the Replication being at large, his claiming but a Lease for years, is a sufficient and good Replication, without answering to the Freehold; Wherefore it was adjudged for the Plaintiff.

Vivian *versus* Shipping. Trin. 10 Car. rot. 1194.

16. **A** Sumpfit. That in consideration the Plaintiff assumed to stand to the award of J. S. and J. D. for certain matters and controverfies betwixt them; and if he failed to pay the Defendant fourty pounds The Defendant assumed in the same manner to pay fourty pounds to the Plaintiff, if he did not perform. And the Plaintiff shews, That the said J. S. and J. D. made an Arbitrament, That the Plaintiff should pay to the Defendant ten pounds, viz. upon the eightieth of August following; and in consideration thereof, That the Defendant should be obliged to the Plaintiff in an Obligation of fourscore pounds, That the Plaintiff should enjoy such

such Copyhold Lands, during the life of the Defendant, or that he would upon request pay him forty pounds, and alledged in fact, That licet the Plaintiff performed the award on his part; and that he, such a day and place, required the Defendant to enter into such a Bond, according to the said promise, The Defendant had not sealed the said Bond, nor had paid him the forty pounds, according to his promise. The Defendant pleaded, Nullum tale fecerunt Arbitrium, and found against him. And now Rolls moved in arrest of Judgement, That this Declaration is not good, first, Because he doth not alledge the payment of the ten pounds; and the award is conditionall in consideration thereof: so if he hath not paid the ten pounds, the other is not bound to make the obligation. Secondly, Because he doth not alledge a special request for the payment of the said 40 l. And the Assumpsit is to pay upon request, and without request, it is not payable. So not being specially alledged, the Action lies not. To the first Jones and Berkeley held, That it is a conditionall award; and that there is a precedent condition, which if not performed, the other is not bound to make the Obligation. But I held the contrary, That it is not a conditionall award, for it only appoints, that he shall enter into such a Bond; and every one hath remedy upon the promise, the one against the other, if they do not perform the award. But we all agreed, That although it be a condition precedent; yet when the Plaintiff saith, he hath performed the award on his side, it is intended that he hath performed it: And it is good in substance, though not in form; wherefore the Defendant might, if he would, have demurred: And when he hath not demurred, but pleaded to the issue, denying the award which is found against him, he shall not now have advantage of this matter of form. To the second they all agreed, when it is an Assumpsit to pay money, although it is upon request, The generall allegation, Licet sapius requisitus, is a sufficient allegation; and the bringing of the Action is a sufficient request for money: Whereupon it was adjudged for the Plaintiff.

Palmer *versus* Knights. Trin. 10 Car. rot. 225.

Assumpsit Whereas there was a contract betwixt the Defendant and one Cubic, concerning certain trees growing upon such Land. The Defendant in consideration the Plaintiff would cut down and carry the said trees to the Defendants house, assumed & promised unto him, That he would save him harmless of all damages & losses which might happen unto him by reason of such cutting down or carrying away, when he should be thereunto required: And he alledges in fact, That he cut down five of the said trees, and carried them to the Defendants house; And that the Defendant had not saved him harmless, licet sapius requisitus, but suffered him to be sued at the Common Law for cutting down and carrying them away; whereby he was enforced to lay out divers sums of money

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in defence of those suits. The Defendant pleaded non Assumpfit, and found against him, and damages to thirty pounds : And it was now moved in arrest of Judgement by Grimston, That the Declaration is not good, because he doth not shew in what Court he was sued, nor what charges he expended, nor how he was damnified, being all in his own knowledge; Wherefore he ought to have shewn the speciall breach, otherwise there is not any cause of Action. Sir William Denny moved, that the Allegation (That he was put to divers costs and charges in defence of the suit) is sufficient : And although peradventure this had been cause of demurrer ; yet having pleaded non Assumpfit, and a Verdict found and damages assent, It appears he was damnified ; Wherefore it is now made good, and he shall not have advantage thereof. And of this opinion was Richardson at the first, That the Verdict ayds it, otherwise clearly it is not good. But Jones Justice and my self held, That the Declaration was ill in substance, no breach being sufficiently shewn, and being ill in substance, the Verdict cannot help it. And to that purpose Jones remembred a Case, betwixt Peck and Methold, where an Assumpfit was, That he should deliver such an Obligation upon request, after payment of such a summe. He alledges in fact, That the money was paid, and that licet sapius requisitus, he had not delivered the Obligation. The Defendant pleaded non Assumpfit, and found against him, and Judgement in the Common Bench for the Plaintiff, and Error brought, Because it was not to be delibered but upon request ; So there ought to be a speciall request, which because it was not made, and the year and place alledged of the request, although the issue was taken upon the Assumpfit and found, yet it was not good : But the Judgement was reversed, which Richardson remembred ; Wherefore he agreed, That the Declaration was not good, nor ayded by the Verdict ; Whereupon Judgement was given for the Defendant.

Hopewill versus Searle. Hill. 9 Car. rot. 269.

18. **E**jectione firmæ. Upon a speciall Verdict the Case was, That an Abbot an. 21 H. 8. made a Lease for octoginta & terdecem annos. The question was only, Whether in this case terdecem annos shall be said to be thirty or thirteen years ? And Prescot for the Defendant argued, That it should be expounded for thirty years, because it shall be taken most strong against the Lessee, when there is no proper word for thirteen. But all the Court held, That it shall be taken according to the Common parlance, for thirteen years, terdecem and tresdecem are all one, and it is so wixt Euphonia gratia, & it being one intire word, cannot be otherwise taken. But if it were wixten as severall words, it should be otherwise ; Wherefore without further argument, it was adjudged for the Plaintiff. And as Baall for the Plaintiff urged, It being after Octoginta

ginta annos, it shall the rather be so intended; for if he had meant it for thirty, it should have been one hundred and ten years. But being so writ, they agreed, It was for ninety three years, and no more; Wherefore it was adjudged accordingly for the Plaintiff.

Baker versus Hacking. Hill, 8 Car. rot. 347.

UPON a speciall Verdict. The Case was, John Coster Tenant in Tail, the Reversion over to Robert Coster in Fee, they joyn in a Lease for life by deed: And afterwards he in the Reversion, during the Lease for life, devise th that Reversion and dies: Afterward Tenant in Tail dies without issue. The question was, Whether this devise be good or not? And it was argued at the Barr by Rolls for the Plaintiff, and by Maynard for the Defendant; and the doubt was, If Tenant in Tail joyns with him in Reversion in a Lease for life, not warranted by the Statute; so as it is a greater Estate than Tenant in Tail can make, whether it be a discontinuance of the Tail only, or a discontinuance of the Reversion also? For if it be a discontinuance of the Reversion, then the devise had not any power to devise. But Jones and I held, upon the first motion, That it is not any discontinuance of the Reversion, because he joyns with the Tenant in Tail: And it is quasi a confirmation of the Lease, during the life of the Tenant in Tail, and during the time that he hath issue: But after his death, without issue, it is the Lease of him in the Reversion: And, during the life of the Lessee, it is a discontinuance quoad the Tenant in Tail and his issue: But it is not so as to the Reversion; for that remains as it was. And Richardson inclined to this opinion; but Berkeley doubted; Whereupon it was adjourned till the next Term.

19.

Hinsley versus Wilkinson. Hill, 8 Car. rot. 302.

ERror of a Judgement in the Common Bench, in an Action upon the Case. Whereas the Plaintiff had declared, That he was a Coppholder of the Manor of Lull, whereof a great Waste, called Lull Waste, was parcel; And the Coppholders of the Manor having Common there, That the Defendant being seised of parcel of a Wood called Lull-wood, adjoyning to the said Common, maintained Conies in the said Wood, which run out thereof into the Common and eat up the Common; Whereupon the Action was brought. The Defendant traversed the Prescription to the Common, and it was found against him, and Judgement given. And now Germin for the Plaintiff in the Writ of Error moved, That this Declaration was not maintainable, because none can say when Conies are upon the Common, whose Conies they be: And they cannot be said to be the Defendants Conies more than any others, for being out of his sople he hath no interest in them more than any other,

20.

other, they being *fera naturæ*; so as he hath not any property in them untill he takes them: and therefore Fitzh. N. B. 87 & 89. saith, They shall not be said *Cuniculos suos*, nor *Pisces suas* in common Rivers: And although the Commoner hath losse, yet it is without injury by the Defendant. And Grimston likewise for the Plaintiff, urged further, That if this Action should be maintainable, there would be multiplicity of suits; for every Commoner would have an Action, which ought not to be suffered: And here is no more cause of Action than when one suffers his Doves to fly into the Corn adjoining; for which clearly no Action lies: for it cannot be known whose Doves they be, and the Commoner is not at any mischief, for he may kill them if he can: And for that point cited, Co. 5. fol. 104. Borastons Case. And so held all the Justices here, besides Berkeley, who doubted thereof; Wherefore rule was given, That the said Judgement should be reversed, if upon such a day, the next Term, other cause was not shewn, &c. which was done to the intent there might be conference with the Justices of the Common Bench, to know if it had been moved in the Common Bench, or if it had passed sub silentio, being after Verdict: And the same day I conferred with Hutton, Vernon and Crawley, Judges of the Common Bench, if they knew any such Case had been moved in their Court, and they all said, they did not remember any such to be there moved, but that it passed sub silentio: And they all held, That an Action upon the Case, lies not for a Commoner, But he may kill them; for none hath any property in them; Wherefore the Judgement was afterward reversed.

Bull versus Wyatt.

21.

Ejectione firmæ, for a Garden in Bristol. Upon a speciall Verdict. The case was, One Reignald and his Wife, being seized in Fee in right of his Wife, by Indenture with Letter of Atturney to make livery, lets that Garden, *Habendum a die datæ*, for life of the Lessee, rendring six shillings eight pence per annum: And the Atturney made livery the same day, *secundum formam Chartæ*: The Lessee enters and paid the rent, which was alwaies received; the wife dies; her Heir, without entry, suffers a common recovery, to the use of the Plaintiff. The question was, Whether this were a good recovery? Rolls for the Plaintiff argued, That the Lease was void, and that livery the same day it bears date, is void, to make it a good Lease. And so held all the Court, and would not admit it to be argued. Secondly, Admitting it to be a void livery, yet he held, that entring and paying his rent, he is but Tenant at Will; As one entring without livery, is Tenant at Will to the Feoffor: And he cannot be a disseisor without an intent in him to make a disseisin, and without the intent of the Lessor to have it to be a disseisin; and he is accounted in Law but as Tenant at Will: And

And for proof thereof, he relied upon 28. Ass. 11. & 1 Ed. 3. Ass. 7. and the Case in this Court Pasc. 9 Car. betwixt Blunden and Baugh, Co. lib. 4. 73. 11 H. 4. 29, 30. 9 H. 6. 6, 7. Thirdly, Admitting it was a Disseisin, yet suffering a recovery, he and all under him are estopped to say he was not Tenant of the Feehold. Wherefore the recovery is good. And to that opinion the Court inclined: But because there were none of the Defendants part in Court, no Judgement was then given; But ruled, That if cause were not shewn, &c. Judgement should be entred for the Plaintiff.

Prouses Case.

Prouse, an Attorney of the Kings Bench, was elected Cythingman of Taunton: In which Town a custome is pretended to be, That every one shall be a Constable or Cythingman, according to their several houses; and he having purchased two houses in the same Town, was, in a Leet there held, elected Cythingman: And thereupon he brought a Writ of privilege to be discharged, because he is to be attendant in this Court. But the Justices of Peace would not allow thereof, but desired the Justices of Assize to direct whether it should be allowed, who would not meddle therewith, but ordered, It should be moved in this Court: Whereupon Maynard now moved, That this writ is not to be allowed; for although in truth Attorneys and Clerks of the Court have such a privilege to be discharged when they are generally elected, because their Attendance being required here, they shall not be compell'd to attend such an Office; yet when there is a special custome, That they shall be elected in course, according to the situation of their houses, that custome ought to prevail against such privilege: For otherwise one Attorney may purchase many of the houses in the Town, and then there shall not be sufficient persons to do the service. As in truth in this Case, he hath purchased seven houses in the said Vill, wherefore he ought to be charged. But all the Court held, That it cannot be a good custome; for then a Woman, being an Inhabitant in one of the said houses, it may come to her course to be Constable, which the Law will not permit. So this custome pretended cannot hold place against a person who is, by his Office, to be attendant here: Whereupon it was ordered, That he should be discharged.

22.

Stevensons Case.

Stevenson being in Execution for a debt to the King, adjudged against him in the Exchequer, was condemned here in this Court in Debt, by a Judgement, and was brought to the Barre by Habeas Corpus, to be charged in Execution for this Debt also. And now Bing Serjeant moved, That he ought not to be charged in Execution here, because he is in Execution at the Kings Suit; for

23.

it is appointed by the Statute of 25 Ed. 3. cap. 19. That a common person shall not have Execution against the Kings Debtors, until he makes agreement for the Kings Debt, and then he shall have his Debtors in Execution, and detain him until he hath made satisfaction of the Debt due to himself, as also of the Debt which he paid for him to the King. Of that opinion was the whole Court: But for as much as he had not a Writ of protection, the Court resolved, That he is out of the Statute; and thereupon awarded, That he should be in Execution as well for the party as for the King.

Griffyths Case.

24.

SCire facias versus Gryffyth, upon a Recognisance for the peace, taken 9 Maii, 9 Car. The first Exception taken by Grimston, was, Because the Recognisance was Garderet pacem, whereas, it ought to have been, Conservaret pacem, Sed non allocatur; For so are many of the precedents, and it is as well as Conservaret pacem. Secondly, Because that the Recognisance is, That he shall appear at the next generall Quarter-Sessions for the said County, and in the interim Gardera le peace. And it was alledged, That after the Recognisance taken, and before the next generall Quarter-Sessions, viz. 29 Junii, 9 Car. he assaulted one Such, and beat him, and so brake the peace. The Exception was, Because he did not shew the day of the next Sessions. And I was of opinion, That for this cause it was ill; for he ought to ascertain the Court when the next Sessions was, and so that the breach of the peace was before the said Quarter-Sessions: But Richardson, Jones, and Berkeley held, the Allegation, That the breach was after the date of the Recognisance, and before the next Sessions, sufficed. But they would advise until the next Term.

Termino Hillarii, anno decimo *Caroli Regis*,
in Banco Regis.

Netter versus Percivall Brett, Mich. 10 Car. rot. 132.

Prohibition being granted, to stay a Suit for the Probate of a Testament concerning Land and Goods; Wherein the Land was charged with a condition in part for payment of certain Legacies, it was prayed to have a consultation. And Jones and Berkeley agreed, that they would have a consultation; Because the probate of Testaments properly appertains to the Spiritual Court, and the probate or non probate cannot be any prejudice to the Heir, nor to him who claims the Land by the Deviser; And an inconvenience would ensue, if there should not be a probate concerning the personall estate, That the Executors might not have any Actions for Debts, nor dispose of the Goods. And therefore Jones said, he had seen the Record of the Marquess of Winchester's Case, Coke lib. 6. fol. 23. Where the Will being for Land and Goods, consultation was granted generally. But I doubted thereof, because the Land is the principall, and they have no authority to meddle with any Will concerning Land; and there might be an inconvenience, if the Will there should be countenanced or discountenanced concerning the Land. And because there was a Prohibition granted, I was of opinion, the parties ought to pursue the usual course, which is, that the Defendant should appear, and the Plaintiff declare; and then upon demurrer it might be adjudged, and not upon a motion. But the other two Justices (Richardson chief Justice being sick and absent) gave a Rule, That if other matter were not shewn, &c. consultation should be awarded. Vide residuum postea, fol. 395.

Gymlett versus Sands. Trin. 8 Car. rot. 678.

Electione firmæ of a Lease of Hugh Boscavele. By a Special Verdict it was found, That Humphry Martin was seized in Fee, and had issue John Martin by Hebell his Wife, who by Indenture, in consideration of love to his said Wife, and to John their son and heir apparent, and to settle the Land upon him and his heirs, enfeoffed A. B. and others, to the use of himself for life, without impeachment of Waste; and after, to his Wife for her life; and after

to the use of the said John Martin and the heirs Males of his body, Remainder to his right heirs. And afterwards the said Humphry, in quinto Jacobi, infeoffed John Smith by Indenture, with warranty against all persons; and afterwards, in sexto Caroli, died. Hebell the Wife and John the Sonne enters, upon John Smith, and infeoffed Boscavele the Lessor with warranty; John Smith enters, then Boscavele the Lessor enters, and makes the Lease in the Declaration mentioned; The Defendant, as servant to John Smith enters and ousts him: They found that the said Hebell was yet alive; Et si super totam materiam, &c. And hereupon Rolls argued for the Plaintiff, first, That the Lessor of the Plaintiff hath good title; for he claims by the Wife and the Sonne, which Sonne hath good title to the remainder clearly; And the Wife hath a good estate for her life; And they had a good title to enter and infeoff the Lessor of the Plaintiff, unless it were by reason of this warranty: And it is not found, that the Sonne is heir to this warranty of the father; for although it be found, That the said Humphry had issue by the said Hebell his wife, the said John in remainder, unicum filium suum; yet it is not found, that he is heir: And it may be that he had other elder sonnes by a former Venter; And the Court will not intend a warranty by supposition. Secondly, This feoffment by the wife joining with John, who hath the remainder, is no forfeiture, without finding, That he had notice of the feoffment and warranty: for as Cok. fol. 5. fol. 110. Mallorys Case, Bargainee by Deed inrolled shall not enter upon the Lessor for non payment of the rent, unless it were shewn, that he had notice. And so lib. 8. fol. 96. Francis Case, Maynard to the contrary for the Defendant, first, he shall be intended heir, rather than otherwise in a special Verdict, Because it is found That he had him unicum filium suum; and it shall not be intended there were more sonnes, without shewing. To the second, That it is a forfeiture; for he ought to have taken notice at her peril, when none is bound to give notice, as here none is bound: And there is a difference betwixt a condition, and this voluntary Act of the feoffment, which is a forfeiture. And afterwards Jones and Berkeley delivered their opinions, That this warranty is no barre, Because it is not found that he was heir; and the rather it shall be intended that he is not heir, because it is a collaterall warranty, which is not to be favoured; And it may be that he had elder sonnes by another Venter; or there might be an Attainder. But I held the contrary, That the Verdict in this point was well enough. and found him heir; for it is found that the Indenture calls him filium & heredem suum apparentem; and a plurality of sonnes shall not be intended; and in a special Verdict intendment sufficeth, especially as this case is, Because if he be not heir, there is no colour to have a special Verdict. Vide Coke lib. 5. Goodales Case, That the Verdict shall be taken by intendment. For the second point they all resolved, That if the warranty had been well found, it were apparent, That the Estate of the Sonne was bound, and her joining in a feoffment with the

the Sonne, is a forfeiture; as if he had joynd with a Stranger who had nothing to do therewith; and that he at her perill ought to take notice of the said feoffment, because the libery is a publique and notorious act, and the feoffment is a forfeiture at the Common Law; and it is not like a condition, which is taken strictly; and he ought at her peril to take notice of this act upon the Land, none being bound to give her notice: Wherefore, as to this point, they all agreed; But upon the first point they would advise.

Memorandum, That upon the fourth of February, *anno decimo Caroli Regis, anno Domini 1634. circa horam undecimam ante meridiem* Sir Thomas Richardson Knight, chief Justice of the Kings Bench, dyed at his house in *Chancery-lane*; And all the Writs which were sealed that day bare *Teste, Thomas Richardson*; and all those which were sealed the next day bare *Teste, William Jones*, he being second Justice of the Kings Bench.

Meade *versus* Thurman.

Prohibition was prayed upon suggestion of this Custome, That for Tares cut or mowen before they be ripe, and given to Plough-Cattle, Cythes ought not to be payed: And upon another custome for head-lands sown with Corn, used to be fed with Plough-Cattle, or mowed and cut for that purpose, That the owners shall be discharged of Cythes. And upon this suggestion grounded upon speciall customes, the Court granted a Prohibition.

Dymmock *versus* Fawcett. Mich. 10 Car. rot. 148.

Action for words. For that he said of the Plaintiff and to the Plaintiff, being of good fame, and one who had served as Captain in the Wars, *hæc verba* in London, Thou art a Pimp, averring, that in London that word was known to be intended a Bawd; And further said, That he was a common Pimp, and notorious, which he would justifie. After Verdict for the Plaintiff, Littleton (the Kings Solicitor) moved in arrest of Judgement, That these words be not actionable; For it is a meer spiritual slander, as Whore or Heretique, and punishable in the spiritual Court, and not at the Common Law: And he said, that divers times Suits have been in the spiritual Court for such words, and Prohibitions prayed and never granted, Vide 27 H. 8. 14. But to say that he keeps a Bawdy house, is presentable in the Law, and punishable at the Common Law. Ward *contra*, Because it is spoken of one of an honourable Profession, viz. a Souldier, and trenches to his disreputation, to be taxed with such a base offence; And he said, that such offences have been divers times punished in London by corpo-

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call punishment. But it was answered, That was by custome; and there the calling one Whore is actionable. Jones Justice held, That the Action lay not. And we all agreed, That the exposition and averment, That Pimp is known to be a name for a common Pandor is good. Berkeley and I agreed, That the words are very slanderous, and more than if he had call'd him Adulterer or Whoremonger; for this is an infamous offence, to be a Solicitor for others for such base offices. And it tends to the breach of the Peace, to use such a course of life; and he may be indicted and punished for it corporally: Wherefore, by the assent of Jones, rule was given, That Judgement should be entred. But afterward, Term, Mich. 11 Car. it was moved again; And Jones holding his first opinion, Brampton agreeing with him, the Judgement was stayed.

Nichols *versus* Walker and Carter. Trin, 10 Car, rot. 222.

6. **T**RESPASS. For entring into his house in Tatrige, and taking of a fowling peece and other goods. Upon Not guilty, a special Verdict was found, That Carter was Church warden of the Parish of Hatfeild, and Walker was Overseer of the Poor of the Parish of Hatfeild; and that the 16. of Novemb. 1632. a Rate was made by the Inhabitants of Hatfeild, for relief of the Poor of that Parish, according to the Statute; And that the Plaintiff was an Inhabitant in Tatrige, having not any Lands in Hatfeild, but having Lands in Tatrige, and was rated by the said Rate at twelbe pence the Month, towards the relief of the Poor of Hatfeild; And that the said Rate, upon the 20. April 1632. was allowed by two Justices of the Peace of the said County, whereof one was of the Quorum, according to the Statute: And that they demanded this summe of the Plaintiff, and he refused to pay; wherefore, by warrant of three Justices of the Peace, to levy that summe upon his Goods and Chattels, they, by virtue thereof, distrained those Goods, and sold them for twenty shillings, and offered the residue to the Plaintiff: And they found that anciently the Village of Tatrige was parcell of the Parish of Hatfeild, and that there was not any legall act, to sever the said Vill from the Parish of Hatfeild, Quodque modo & ante tempus cujus, &c. the Tythes of Tatrige were payed to the Parson of Hatfeild; And that the Parson of Hatfeild used alwaies to find a Curate at Tatrige, And that there is no Parson at Tatrige; And that for threelcore years past and more, and at the time of the making of the Statute of 43 Eliz. cap. 2. for relief of the Poor, & semper exinde usque hunc diem, dicta Villa de Tatrige communiter reputata fuit esse Parochia de se, & per totum idem tempus Constabularios, Gardianos Ecclesiæ, & Supravisores Pauperum dictæ villæ de Tatrige habere consueverunt per electionem Inhabitantium ibidem; And that for all the said time, Rates, Assessments, & Levies have been made there by them, for the relief of the
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poor of Tarridge, which rates, during all the said time, have been used to be levied by their proper Officers for relief of the poor there, without any paying to the poor of Hatfeild, or joining in any assessment with the Town of Hatfeild: And that the Church of Tarridge, during all that time, have had all Parochiall Rights: And that the Inhabitants of Tarridge have not used all that time to contribute to the reparation of the Church of Hatfeild, but to the reparation of their own proper Church and Chappell only, *Ecce super totam materiam, &c.* And after argument at the Barre by Brian for the Plaintiff, and by Atkins for the Defendant, the Court resolved, That Judgement ought to be given for the Plaintiff: For Tarridge being a Parish in reputation so long before and after the Statute, and at the time of the Statute made, It shall not be now for this purpose charged by Hatfeild; But it shall be charged by it self, and for their poor only. And they relied upon a Judgement given in the Common Bench Mich. quarto Caroli, betwixt Hilton and Pawle. *Quod vide ante fol. 92.* Secondly, Atkins moved, Although it should be allowed, that the Inhabitants of Tarridge be not chargeable with these rates, yet upon this Verdict the Defendants be not guilty, Because they did it by Warrant from the Justices of Peace; so they did it as Officers, and therefore excusable. Sed non allocatur; for the rate being unduely taxed, the Warrant of the Justices of Peace for the levying thereof will not excuse. And it is not like where an Officer makes an Arrest by Warrant out of the Kings Court, which if it be Error the Officer must not contradict, Because the Court hath general Jurisdiction: But here the Justices of the Peace have but a particular jurisdiction, to make Warrant to levie Rates well assent: Whereupon it was adjudged for the Plaintiff.

The Case of *Netter versus Percivall Brett*, Ante pag. 391.

WAs argued by the Justices seriatim. And Jones and Berkeley agreed, That consultation shall be granted to prove the Will, Because it is one intire Will, although it be made as severall Wills: for that he first made his Will concerning his goods, and makes the Defendant his Executor, and appoints therein divers Legacies; and after in the same paper, leaving the space of a line void, he writes in this manner, That if his personall Estate shall not suffice to satisfy his Legacies and Debts, He appoints part of the profits of the Land to his Executors for a time: And in conclusion of the Will, In witness whereof, to this my Will I have put my Hand and Seal, and thereto subscribed his name and put his seal. So it appears to be all one intire Will: And therefore Berkeley said, that he would insist upon two rules, first, That the probate of Testaments for personall things, appertains only and properly to the Spirituall Court: And for the probate of such Testaments, no Prohibition lies. Secondly, That the probate of Testaments concerning

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concerning Lands only, and no goods contained therein, ought not to be proved in the Spiritual Court by compulsion, although they may be proved there: And if there be a Suit to compell any to prove such Testaments in the Spiritual Court, a Prohibition lies: and commonly such Wills where the Lands are devisable by custome, are proved before the Ordinary; and therefore the Register 246. mentions, That Wills of Lands in London are first proved before the Ordinary, and after before the Mayor in the Hustings. And in Boroughs a devise of Lands by custome, is as a devise of Chattels, and so termed and reputed. Then when a Will is concerning Lands and Goods, and is one intire Will (as the conclusion of this Will makes it) and in the Will of the Land is a clause, That the profits of the Lands shall be for the performance of the Will, so as it is a mixt Will, It is reason it should be proved intirely in the Spiritual Court, to enable the Executor to sue for Debts, and to expedite the payment of the Legacies, which otherwise might be longer delayed. And the probate of the Will for the Land will not prejudice the Heir; for it shall not be evidence at the Common Law; nor the witnesses being there examined, their examinations shall be given in evidence at the Common Law. And Berkeley cited the resolution and agreement of all the Judges before the King, That where a Testament is made of Land and Goods, no Prohibition lies to stop the probate of the said Testament for the Goods: And that in such case, the Testament being mixt of Land and Goods, probate shall be of the intire Will, and ought not to be of parcells; And he likewise cited the Case 9 Eliz. Dy. 254. That Land was devised to be sold for payment of Legacies, the Land being sold, the suit, for the money to be distributed, may be in the Spiritual Court, contrary to the opinion in 4 & 5 Phil. & Mariae, although it be rising out of the Land: And Jones Justice agreed with him in respect of the inconvenience which otherwise might ensue, if the probate of the Testament for the goods should be deferred. And they both held, that a consultation shall be awarded. And although it is here granted upon motion without special pleading and demurrer, Yet Jones said, it was good enough; for anciently in this Court, there were no Declarations and suggestions upon Prohibitions, but they were granted upon motions: And consultations were granted upon motions without demurrer, as in the Common Bench. But I argued to the contrary, first, That the Prohibition is well granted, and upon good grounds, and therefore a consultation ought not to be awarded. Secondly, If it should be awarded, yet it ought to be after Plea and Demurrer; so as the matter might appear in pleading, for what cause it is granted. To the first, That it is well granted, because the Prohibition, as it is drawn and granted, doth alledge, That the Testament is made of the Land; and no mention of the goods, and thereby is endeavoured to make a probate of this Testament,

ment, which concerns Lands only, and so to draw into question laicum Feodum, and alwaies in such cases, a Prohibition was granted: And whereas in the Register it is said, That the probate of Testaments in London, is first before the Ordinary, and then in the Hustings, It was answered, that is alledged to be by speciall custome, which proves that without speciall custome, it ought not to be proved there. And to the resolution of the Justices, That a Prohibition shall not be granted to stop the probate of a Testament for Goods, where it is made for Land and Goods, that doth not prove, that a Prohibition may not be granted, to stop the probate of a Testament for Lands; And as my Brother Berkeley said, Testaments of Land only, shall not be proved in the Spirituall Courts, and a Prohibition shall be granted, if they so do: So here, for any thing which appears to the contrary, and as it is supposed in the Prohibition, the Court as Judges cannot take consulance, that it is otherwise: And although the Copy of the Testament be shewn untous, that it is in one entire Paper, and one Seal, and the other circumstances before mentioned, yet that is but private information, of which we are not to take cognisance, as of matter of Record: And I assented unto the case in 9 Eliz. but upon this reason because the Land being sold, the mony is personall, and Acts in the hands of the Executors; so as it labours not of the Realty being executed. Secondly, I held, That if consultation should be granted, it ought not to be in this manner, contrary to the usuall course, upon a motion, without pleading and demurrer: And as it is here upon an interlocutory speech at the Barre only, the ground thereof not appearing of Record: And inconvenience would ensue if such course should be suffered; for the party might be prejudiced, and peradventure erroneously; and yet he should not have his writ of Error: And for this very cause divers presidents have been, where Prohibitions were granted: As in the case of the Marques of Winchester Mich. 38 & 39 Eliz. rot. 355. inter Lloyd and Lloyd, Mich. 3 Car. in the Com. Bench Westleys Case, Mich. 5 Car in B. Reg. betwixt Hill and Thornton, Where a Prohibition being granted, and a Cryall, Whether it were a good Will? and found good; yet a consultation was granted only for the Goods: But here in this case a consultation was granted generally.

Miller and Johns *versus* Maynwaring.

ERror of a Judgement in Chester, in Ejectione firmæ of Lands in Blacon, of the demise of Sir Randolph Crew, the 12 of Aug. 4 Car. Where, upon a speciall Verdict, it was found, That John Earl of Oxford and Elizabeth his wife, in right of the said Elizabeth, were seized in fee of the Manor of Blacon, whereof the Land in question, is parcell, and had issue John: And after the said John Earl of Oxford by Indenture the 10. of Febr. 27 Hen. 8. let that Manor to Anne Seaton for thirty four years, that afterward Elizabeth died, 29 H. 8. and on the 21 Martii, 31 H. 8. the said John

8.

Earl of Oxford died, afterward 30 Julii, 35 Hen. 8. the said John the sonne, then Earl of Oxford, by Indenture reciting the Lease to Anne Seaton to be dated 10. Feb. 28 H. 8. let the said Wanoz to Robert Rochester, Habendum after the end, surrender, or forfeiture of the said Lease to Anne Seaton for thirty years: And they find, That after the making of the said Indenture, the said words, 28 H. 8. were rased and altered, and made 27 Hen. 8. And that afterward, viz. 26. Martii, 35 H. 8. the said John Earl of Oxford, by Indenture betwixt him and Hamlet Freere, (reciting the Lease to Anne Seaton, 10. Feb. 27 H. 8.) granted the reversion of the said Wanoz and premises to the said Hamlet Freere, Habendum the said Wanoz and premises, from such time as the same shall revert and come to the possession of the said Earl or his heirs, by surrender, forfeiture, or otherwise, for sixty years: That afterward in 4 Eliz. the said John Earl of Oxford died seized, and the said Wanoz descended to his sonne Edward Earl of Oxford, That he by Indenture betwixt him and Geffry Morley, dated 14. Julii, 15 Eliz. reciting, whereas John his father by Indenture, 30. Julii, 35 H. 8. demised to Robert Rochester the said ferm or Wanoz of Blacon, Habendum for thirty years, from the end or determination of the Lease made to Anne Seaton, dated 10. Feb. 27 Hen. 8. for twenty four years (which is a false recitall; for in Rochesters Lease it is recited, that the Lease to Anne Seaton, was dated 10. Feb. 28 H. 8.) and regranted the Lease to Hamlet Freere for sixty years, to begin after the expiration, surrender, or forfeiture, (omitting the words, or otherwise) of the Lease to Anne Seaton: The said Edward Earl of Oxford demised the said Wanoz and ferm of Blacon, to the said Geffry Morley, Habendum from the end of the said Leases for fifty years. And if, &c. So the question was, Whether any of these Leases, to Hamlet Freere or Morley be good, and were in esse at the time of the Lease made by Sir Randolph Crew; for Sir Randolph Crew claimed the Inheritance of the Wanoz from the Earl of Oxford, and Sir William Norris claimed the Leases from Morley and Freere, and under him the Defendant claimed: And Judgement was given in Chester for the Plaintiff: And now Error was brought of this Judgement, and the Error assigned in point of Law, That Judgement was given for the Plaintiff, where it ought to have been given for the Defendant: And after severall arguments at the Barr by Rolls, and Mason Recorder of London, for the Plaintiff in the Writ of Error, and Calthorp and Sergeant Hedley for the Defendant, It was now this Term argued by the Justices, seriatim, And all the Justices agreed, That the Judgement in Chester was well given, and should be affirmed. The first question moved, was, Whether the Lease to Anne Seaton, was determined after the death of John Earl of Oxford, who made it, who was seized thereof in right of his wife, and Tenant by the Courtesie, or only determinable by the entry of the Heir? For if it were only determinable, then no entry of the Heir being found, it was

was continued, and the reversion was in the Earl of Oxford, the sonne, at the time of the Lease made to Hamlet Freer. But for this point upon the first argument, Richardson then living, agreed with the other Iustices, That it was determined and void by the death of the said John, then Earl of Oxford, Tenant by the Courtiege, the wife being dead before; and then Anne Seaton was but Tenant at sufferance, and the freehold in the Earl of Oxford, and no reversion, and for that point overruled it without further argument. For it is absolutely determined by the death of the Tenant by the Courtiege, and no acceptance of the Rent, or confirmation after by the Heir, can make it have continuance, Vid. 1 Ed. 6. Acceptance 19. Cok. lib. 2. fol. 77. The case of Harvie and Thom. cited Cok. lib. 8. fol. 34. in Payns case. Secondly, When the Lease to Rochester began? And as to that all the Iustices resolved, That it began presently at the time of the sealing; because there was no such Lease in esse to Anne Seaton at the time of the Lease to Rochester, but determined three years before; by the death of the said Earl of Oxford, and there was no such Lease made to Anne Seaton, but had other beginning and other ending, than is recited; and therefore it began presently, Vid. 3 Ed. 6. Br. Leases 62. Cok. 6. fol. 30. in the Bishop of Baths case, Plow. Throgmortons case, Cok. Lit. 46. b. Cok. 4. fol. 74. Dy. 116. Thirdly, The Lease to Rochester being rased in a materiall part, after the sealing and delivery thereof, Whether that rasure be a cause to make the Lease void, or if the Lease be good notwithstanding this rasure? And Jones and Berkeley held, That the deed is voided by the rasure, but the Lease is good and remains in esse notwithstanding this rasure: And as to that, took a difference, when an Estate looeth his essence by a deed, viz. where it may not have an essence without a deed, as a Lease by a Copporation, or of Cythes, or grant of a Rent charge, or such like, if the deed be rased after delivery, it determines the Estate & makes it void. But when the Estate may have essence without a deed, there although it be created by a deed, and the deed is after rased by the party himself or a stranger, that shall not destroy the Estate although it destroys the deed, wherefore rasure here doth not make the Lease void and determine it. But I argued to the contrary, in this point, That for as much as it is a Lease by the deed, it is a contract by the deed, and the party himself who hath the interest by the deed, rasing that deed, he determines the deed, and his interest by his voluntary act, as if he had surrendzed; and the contract being by deed, he may not determine the deed and the covenants, but quoad himself he doth destroy it, but peradventure quoad the Lessor it may have essence, if the Lessor will: But this is at his election, and not at the election of the Lessee, See for this point, Cok. 11. fol. 27. Dy. 261. Co. 10. fol. 97. in Doctor Leyfeilds case 7 Ed. 3. 57. 14 H. 8. 27. per Brook 44 Ed. 3. 42. Fourthly, Whether the Lease to Hamlet Freer be good or void? And that rests upon consideration, whether the Lease of the Land by the name of a Reversion, where
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he hath the Land in possession and hath no reversion (as it is if Seatons Lease be determined in fact, and Rochesters Lease be void by the casure, or that he be not in possession by virtue of the Lease (because it is not found, that Rochester entred by virtue of the Lease, and so cannot be an estate turned into a Reversion) be a good Lease? And for this point all the Iustices agreed, That it is merely a void Lease; for the grant in the premisses is only of a reversion, and it was the intent of the parties to passe the reversion only expectant upon the former Leases. And when there is not any Reversion, it cannot passe the Land in possession; for by the name of a Reversion Lands in possession cannot passe; but by the name of Land, a Reversion may well passe, for he who will grant Lands in possession, will rather grant them in Reversion: But not so e converso. And although the Habendum is to have and to hold the Land, That shall not passe the Land in possession, for it is intended he should have the Lands so retourning. And Deeds are to be construed, that they shall passe things according to the intent of the parties, and the strongest against the Grantor according to the apparent intent, and here the grant and demise is only of a Reversion, and the Habendum shall not enlarge it contrary to the Grant; so this Lease to Hamlett Freer is merely void; and if it be not void, it is determined in time, for it began from the date, and then it is determined by effluxion of time: See expresse authorities, that by the Grant of a Reversion, if he hath not a Reversion, nothing passeth, Co. Lit. 46. Co. lib. 10. fol. 107. in Doctor Leyfeilds case; this point is recited to be so resolved Co. lib. 5. fol. 104. Saffyns case Plow. 196, 423, 433, and 146. in Throgmortons case. And where it was said, That the words and other the premisses would carry it, it was answered, That cannot be; for other is alwaies another thing than that before mentioned; and the Reversion of the Manor of Blacon is expressly mentioned; So other cannot be extended to it, Vid. Co. lib. 1. fol. 177. 35 H. 8. Grants Br. 150. The fifth question was, Whether Morleys Lease were in esse at the time of this Lease made by the Plaintiff, and it was resolved, That it was not, for that misrecites the former Leases, and so hath the same Rule as the former, where it recites Leases and there be none such; Therefore it shall begin from the date, which being in an. 15 Eliz. for fifty years, ended 1623. Wherefore for all these reasons, the Judgment was affirmed.

Sir John Stonehouse and Elizabeth his Wife *versus* Sir John Corbet.

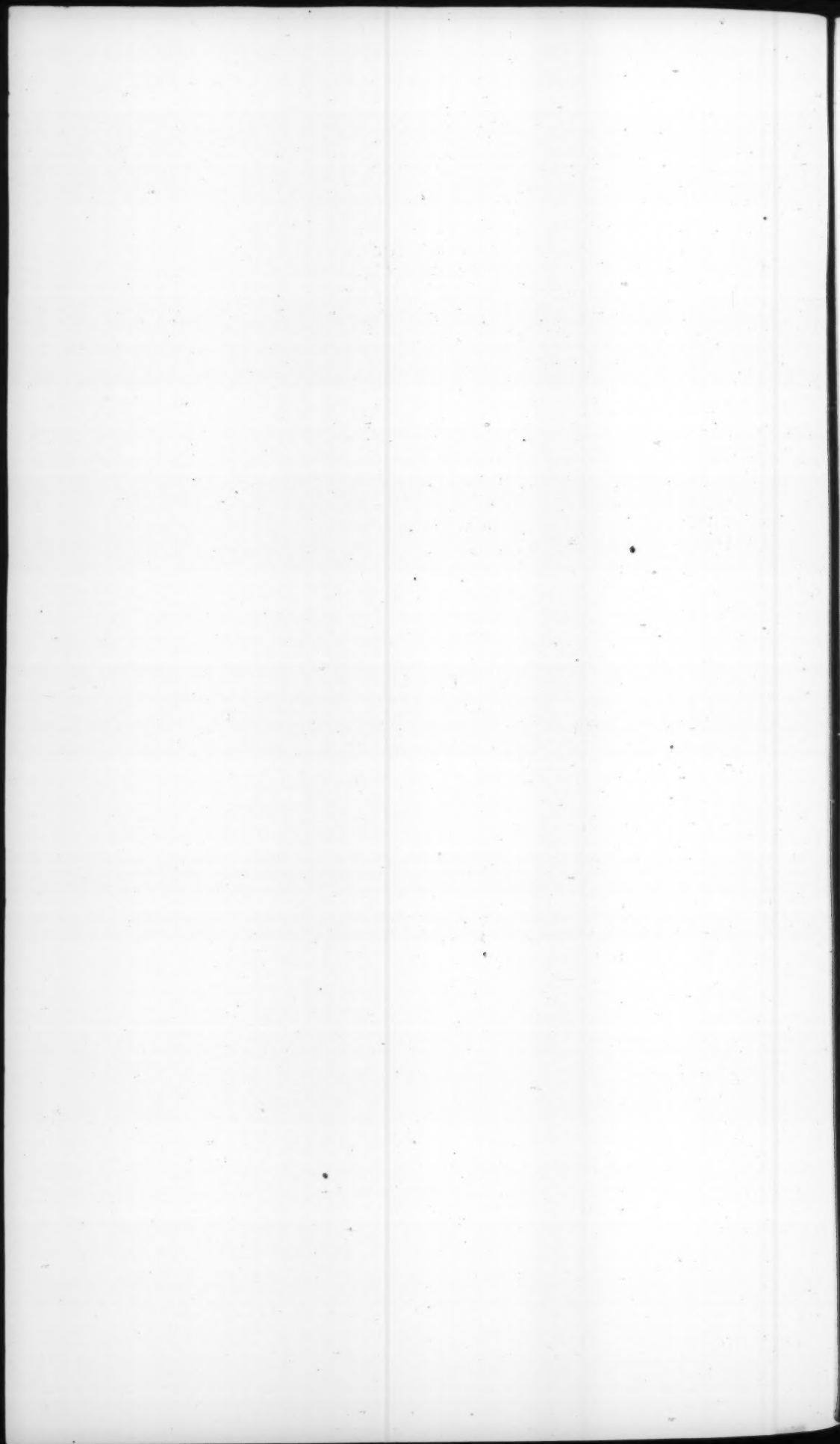
9. **E**RROR of a Judgement in the Common Bench in Waste. Divers Errors were assigned concerning the Waste, and the proceedings therein, all which being overruled, one main Error was assigned ore tenus per Serjeant Henden at the Parre, for that in the Action of Waste he declares, That Sir Rich. Corbet was seized in fee, and in Pasc. 8. Jac. leyed a fine of that Land to the use of himself for life; and after to the use of Eliz. his wife, for her life; and after to

to the use of himself and the Heirs males of his body, and after to the use of Sir John Corbet Plaintiff, and the Heirs males of his body; and to the use of the Heirs of Sir Rich. Corbet: And that afterwards in Hill, 8 Jac. the said Sir Rich. Corbet levied another fine of the same Land, to the use of himself for life, and after to the use of Sir John Corbet and the Heirs males of his body, and after to the use of the right Heirs of the said Sir Rich. That afterwards Sir Rich. died, and that his wife entered, and was seized for term of her life, the Reversion to the Plaintiff, and that afterward she married Sir John Stonehouse, and committed Waste ad exhereditationem of the Plaintiff. The Error assigned and insisted upon, was, That the Plaintiff hath not sufficiently entituled himself unto the Reversion, to punish the Waste; Because he doth not alledge, That Sir Rich. Corbet was dead without Issue male; and if he be not dead without Issue male, the Plaintiff cannot punish this Waste: And although the Defendant by pleading to the Waste, hath admitted it to be to his disinherittance, yet Intendment shall not help it, being matter of substance. But it was thereto answered, That for as much as 'tis said, She entered and was seized for life, the remainder to the Plaintiff, it is intended that Sir Rich. is dead without issue. Also he alledging it to be done to his disinherittance, that cannot be if the other had any issue alive. And the Verdict hath found it to be to his disinherison, by which it is to be intended, that Rich. died without issue; wherefore Berkeley and my self held it to be no Error. But Jones doubted thereof. Afterward upon another motion, it was adjudged, That the first Judgement should be affirmed, Vide 5 Ed. 3. 37. 7 Ed. 3. 46. 13 & 14 Eliz. Dy. 304. Co. lib. 10. 63. Nuper, &c.

Bowton *versus* Nicholls.

Error of a Judgement given in the Common Bench: Where Judgement was given for the Defendant, and that Judgement here affirmed, and 10 l. costs given here to the Defendant upon the Statute of 3 H. 7. And it was now moved by Grimston, That costs were not grantable; For the Statute is, where Judgment is given against the Defendant or Tenant, and he, to delay the execution, brings a Writ of Error, and the Judgment is affirm'd, That he shall have costs for delaying his execution. But here the Judgement is given for the Defendant in the Common Bench, so no execution was to be awarded there against him: But the Plaintiff was barred, and although the Plaintiff brought the Writ of Error, and the Judgement is here affirmed, yet it is out of the Statute. And of this opinion was all the Court, upon consideration of the Statute; Wherefore a Superedeas was awarded to stay execution for the costs.

10.





Termino Paschæ, anno undecimo *Caroli* Regis,
in Banco Regis.

Memorandum, That the first Saturday of this Term, being 18. April 1635. Sir *Fohn Brampton* Knight, of the *Middle Temple* (one of the Kings Serjeants) was made Chief Justice of the Kings Bench. And first the Lord Keeper made a grave and long speech, signifying the Kings pleasure for his Choyce, and the duties of his Place: To which, after he had answered at the Barr, returning his thanks to the King, and promising his endeavour of due performance of his Duty in his Place, he came from the Barr into Court, and there kneeling took the Oathes of Supremacy and Allegiance, according to the Statute 3 *Jacobi*: Then standing he took the Oath of Judge, which is the same Oath that all other Judges take: Then he was appointed to come up to the Bench, and then his Patent (which was onely a Writ to attend the Office) being read by *Broome* Secondary, the Lord Keeper delivered it unto him: But *Jones* said, That the Patent ought to have been read before he came up to the Bench.

1.

Anonymus.

A Prohibition was prayed by *Grimston* to the Spiritual Court, for suing for Tythe of Lambs, surmising the Custome to be, That if one hath Lambs under the number of seven, he ought to pay an half-penny for every Lamb under that number, in lieu of all Tythes of Lambs; and if he had but seven, the Parson should have the seventh Lamb, and should pay 3 d. and if he had eight he should pay 2 d. and if he had ten the Parson should have the tenth without paying any thing. *Berkeley* and *Jones* held, That the Canon Law is so, and so received in the Spiritual Court, & it is surmised, that the Spiritual Court allows of it; and therefore there needs not any Prohibition. But because it was alledged, That it was a custome, and the Parson would stay untill the tenth, and would refuse to accept according to the Custome: And that in the Spiritual Court, this surmise is not allowed; Therefore *Brampton* Chief Justice and my self conceived, That a Prohibition is grantable for that cause, and *Jones* and *Berkeley* agreed, That it would be granted, and the party might demurr if he would: Also for Tythes of Aftermowth, that there is a custome in consideration, that he should make the first Con-

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sure in good and sufficient Pay and set it out in Cocks sufficiently dyed and ready to carry, that he should be discharged from the payment of Tythes of the Aftermowths: And that was held a good suggestion, by reason of the costs he bestowed in making it to be perfect Pay: And upon a surmise made, that he was sued for Tythes of Bæss, That in consideration he paid Honey and Wax, and was at the charge for Hives and maintenance of them in Winter, he should be discharged of the Tythes of the Bæss themselves: And upon these surmises a Prohibition was granted, being one of the first cases moved after Brampton was made chief Justice.

Hawkings *versus* Billhead. 10 Car. rot. 1312.

3.

Action for words. Whereas the Plaintiff was of good name and fame, and of a chaste conversation, and divers had offered to marry unto him their daughters: And whereas he was in communication with one William Russell to marry his daughter, and the said William Russell was willing to have his daughter to match with him, and offered forty pounds in Marriage: That the Defendant, having communication with one J. S. and others of the Plaintiff, The Defendant, the 20. of September, septimo Caroli, to discredit the Plaintiff and hinder him of his Marriage, said of the Plaintiff, That the Plaintiff had layn with such a Woman and others, and them *carnaliter cognovit*, by reason whereof the said William Russell utterly refused to give his daughter to match with him; and that he caused the Plaintiff to be prosecuted in the Archdeacons Court for that incontinency; and thereupon he brought his Action in this Court, Mich. 10 Car. The Defendant pleaded Not guilty, and found against him. And now Maynard moved in arrest of Judgement, That these words being spoken 20 Sept. 7 Caroli, and the Action being brought Mich. 10 Car. (whereas it ought to be brought within two years by the Statute of 21 Jac. of Limitations) by his own shewing, it is brought for words spoken above two years; and therefore he is to be barred of this action. But because he had admitted the Action, and had not pleaded the Statute of Limitations, but Not guilty, Jones and Berkeley Justices held, That he shall not now have advantage thereof: And Jones said, That he knew it had been so ruled twice in the time of the Lord Lea chief Justice, and in the time of Sir Randall Crew chief Justice; For otherwise there should be a mischief in this Court more than in another Court, (*viz.*) in the Common Bench, where they prosecute by originall and outlawry; and if the outlawry be reversed, the Statute aids the Plaintiff. But here they proceed by Laticar, whereby the cause of the Action doth not appear, and may peradventure divers years continue by Process, before the Defendant may be arrested; And the Plaintiff in his Declaration needs not shew the cause wherefore he did not commence his Suit sooner, for if he should do so, the Declaration would be more prolix than was convenient

venient. But if the Defendant pleads the Statute of 21 Jac. then the Plaintiff by the Replication ought to shew good cause, why he did not bring his Action within the time limited by the Statute; otherwise he is to be barred: For the Statute allows of many impediments, viz. Infancy, Imprisonment, *onster le meer*, and others therein mentioned, which shall be sufficient causes, that the Action was not brought sooner. But I doubted thereof, because by his own shewing, it appears that the Action is not brought within the time limited by the Statute: And the Statute is in the negative, That it shall not be brought but within the time; so the Court, ex officio, ought to abate it, unless he had shewn wherefore it was not brought within the time, But by the opinion of the other Justices, it was adjudged for the Plaintiff, unless other cause, &c.

The Case of Baker *versus* Hacking, Quod vide ante pag. 387.

4.
WAs now this Term argued at the Barre, and after at the Bench. And Brampston, Jones, and Berkeley argued, That the Devise was void: For they all held, That the Lease for life is onely the Lease of the Tenant in Tail, during his life and the life of the Lessæ; and then it is a discontinuance, and the Reversion taken from him in reversion is displaced: And then he having nothing in the Reversion but only a Right, cannot make a Devise: For the Lease being a Lease for life, rendring a Pepper corn, is not warranted by the Statute of 32 H. 8. And then being a Lease for life of the Lessæ, the livery is only made by the Tenant in Tail; for he hath the sole power of the immediate Fræhold and the immediate possession and Inheritance; Then when they make a Lease for life, it is an immediate wrong to the intaile, and discontinues the Estate Tail during the life of the Lessæ; And the Tenant in Tail hath gained a new sæ, and is seized of a Reversion in sæ expectant upon the Estate for life during the Lease, and it is a new Reversion in the Plaintiff: And for that, they relyed upon 11 H. 7. and 13 H. 7. If there be Tenant in Tail, Remainder to his right Heirs, he may be restrained by a condition not to alien; for his Feoffment is there held a discontinuance: And Jones cited a Case adjudged betwixt the Lord Cromwell and Andrews, 15 Eliz. Tenant in Tail, Remainder to his right Heirs, makes a Feoffment by Deed, and delivers the Deed to the Feoffæ, and after livery is made by an Attorney. The question was, Whether the Remainder passed by the delivery of the Deed? For then livery to him in Remainder had not been a discontinuance: But it was resolved, that it was a discontinuance: And there is no difference when Tenant in Tail, Remainder to his right Heirs, makes a feoffment; And when he in Reversion and Tenant in Tail joyn in a Lease for life, which is a discontinuance; And it is a discontinuance presently, or it cannot be a discontinuance by the death of the Tenant in Tail having issue; for, as Brampston said, the change of the Reversion is presently by

the livery or not at all, and it is not changed by the death of the Tenant in Tayle having issue, and that being a Lease for the life of the Lessæ, cannot be construed to be a Lease for the life of the Tenant in Tayle (as it shall be construed if it be not a discontinuance) and after his death without issue, a Lease for life against him in reversion; Wherefore they all concluded, That it was a discontinuance and Judgement ought to be given for the Defendant. But I argued to the contrary, That it is not any discontinuance, nor the reversion displaced; First, Because it shall not be taken to be a tortious Lease and a discontinuance, when by any means it may be construed a good and rightfull Lease, and it may be here so construed, when Tenant in Tayle and he in reversion joyn; For it is an Estate derived out of both their Estates, viz. a Lease of the Tenant in Tayle as long as he lives, and afterward of him in reversion, as Cok. Lit. 42. and Cok. lib. 6. fol. 14. Treports case is resolved. Secondly, it is no discontinuance, because they joyn in the Lease; for he in reversion joyns in the Act of making of this Lease, and so it is not the intention of any of the parties to disinherit him in reversion, and to take away or displace the reversion. Wherefore the Law shall not make any such construction, especially here, when Tenant in Tayle is dead without issue, there is not any issue against whom there should be a discontinuance; and it is not a discontinuance unto the reversion, because he joyn'd. To prove this was vouched 27 H. 8. 13. Co. lib. 1. fol. 76. Bredons case: And an Act may be a discontinuance now, and not a discontinuance by matter ex post: As if Tenant in Tayle infeoff him in reversion, and a stranger, and he in reversion survive, it is no discontinuance: So if Baron and Feme make a Lease for life, by Dæd of Lands of the Feme, if the Feme, after the death of the husband, agrees, it is no discontinuance; but if she disagrees, it is a discontinuance. So here, if Tenant in Tayle had died having issue, it might have been a discontinuance against the issue. But if otherwise it is against the intent of the parties, to construe it to be a discontinuance, when Tenant in Tayle hath no issue. But all the other Justices held it to be a tortious Act in it self, And that although he hath not afterward any issue, it is not materiall; Wherefore it was adjudged for the Defendant.

Mayo versus Coghill.

5. **E**RROR of a Judgement in Ejectione firmæ against Baron and Feme. The Defendants pleaded Not guilty, and the Feme was found guilty, and the Baron found Not guilty; and Judgement against the Baron and Feme quod Capiantur, and for this cause the Error was assigned; because the Judgement ought to have been against the Feme quod Capiatur, and not against the Baron, where he is acquitted; For he ought not to be imprisoned for his wives offence

fence : But Rolls for the Defendant in the Writ of Error moved, That it is not any Error, and that the Judgment in this case ought to be against them both quod capiuntur: for it is only for the fine to the King; and the imprisonment is no longer, but untill the fine be paid; And the Baron ought to pay it, for the Feme cannot. And to prove this, he cited a president in this Court, Trin. 4 Jac. rot. 376. betwixt Lewes and White, where, in a Writ of Error upon a Judgment in the Common Bench in Trespass against Baron and Feme, they pleaded Not guilty, and the Baron was acquitted, and the Feme onely found guilty; and the Judgment was against them both, Quod capiuntur. And it was assigned for Error for this cause, and the Judgment affirmed. And Broom the Secondary said, That so are all the presidents of this Court; wherefore the Court here awarded accordingly, That notwithstanding this Error, the Judgment should be affirmed. But then another Error was assigned, That in the Declaration there was not vi & armis: And upon view of the Record it appeared, That it was in the Writ vi & armis intravit, &c. But in the Count it was omitted; wherefore for this cause the Judgment was reversed.

Termino



Termino Trinitatis, anno undecimo Caroli Regis,
in Banco Regis.

Bushell, Hurstwayt, and Brand *versus* Yaller. Trin. 10 Car. rot. 456.

1. **E**rror of a Judgement in the Common Bench by Bushell the Defendant, and Hurstwayt and Brand the Bayle, in the Common Bench, against Yaller. It was assigned for Error by Grimston, That no Capias was awarded against the principall; and yet a Scire facias issued against the Bayle, and Judgement against them. And therefore he said, That this Writ of Error brought by the Bayle and the Principall, was not good; for they ought not joyn in a Writ of Error; for the Bayl may not avoid the Judgement against the Principall by any Error which is in the proceeding; and the Principall hath nothing to do with the Judgement against the Bayl. And of that opinion were all the Justices, besides Berkeley, who doubted thereof; because by the Judgement against the Principall, the Bayle is damnified; wherefore he conceived, They should join in the Error to avoid the principal Judgement. But he agreed, That the Principall ought not to joyn in a Writ of Error, to reverse the Judgement against the Bayle: And afterward he consented with the other Justices, That a Writ of Error lies not in this manner; wherefore it was abated.

Townsend *versus* Hunt. Hill. 11 Car. rot. 774.

2. **A** Sumpsit. The Plaintiff declares, Whereas Francis Townsend made his Will, and thereby devised to the Plaintiff threescore pounds, to be paid at his age of one and twenty years; and made Anne his wife his Executrix, and left assets to pay his debts and Legacies: And that the said Anne took the Defendant to husband, and afterwards the Plaintiff came to full age; and the Defendant and his wife paid to the Plaintiff, in part of payment of the said Legacy, upon the 23. of April, thre and fifty pound, who gave to the Defendant and his wife a general release. That the Defendant, 28. Septemb. 5 Car. in consideration that the Plaintiff, at the Defendants request, had made a general release to the Defendant and his wife, assumed to the Plaintiff, That if his wife did not pay the seven pounds residue of the said Legacy in her life time, that he would pay it after his (the said Defendants) wife's death: And alledges in fact, That the Defendants wife did not pay the said seven pounds in her life; and that he had required it of the Defendant,

Defendant, and he had not paid it, per quod Actio accrevit. And upon this Declaration the Defendant demurred. And it was argued at the Barre by Farrer for the Plaintiff, and by Calthorp for the Defendant. And he shewed for cause of his demurrer, That this promise being for a consideration past, is a void promise, and here is not a continuing consideration, but nudum pactum, unde non oritur Actio. And compared it to the Case in 10 Eliz. Dyer 272. Where one promised to one who was Bayle for his servant, to save him harmless, It was adjudged a void promise, and for this reason Berkeley Justice was of that opinion. But if it had been a consideration continuing, As in consideration of marrying his Daughter or Cousin, which is as a gift in Frank-marriage, it had been good. But not here, no more than if in consideration you gave him an horse a year since he had promised to pay you ten pounds, which is void, because past. But Justice Jones and my self upon the first motion conceived it good: For if this promise had been made at the time of the release made, it had been clearly a good promise and a good consideration, Then being made after the release, for as much as the release is made at the Defendants request, and the Defendant hath the continuance of the benefit thereof, The promise upon this consideration is good enough: For so the Case imports in decimo Elizabethæ Dyer 272. if the Bayle had been entred into at the Masters request, and afterwards he had made the promise, it had been well enough. And for this purpose they vouched a Case, which was Pasch. vicesimo quarto Elizabethæ, betwixt Marsh and Raynsford, And another case here betwixt Rigges and Bullingham, Where, in consideration that the Plaintiff, at the Defendants request, had granted the next avoidance of such a Church, the Defendant, at a day after, promised to pay to the Plaintiff one hundred pounds. After Verdict, upon non Assumpsit, it was moved in arrest of Judgement, First, Because there was no time or place mentioned, when that Grant was made. Sed non allocatur, Because it was but an inducement to the Action. A second exception, because it was a consideration past, and it might be twenty years before. Sed non allocatur, Because it was made at the Defendants request. And afterwards, in Mich. 11 Car. the principal Case being moved again, all the Justices, seriatim, delivered their opinions, That 'twas good, and it was adjudged for the Plaintiff.

The King *versus* Sir Basill Brook.

SCire facias. Quare non satisfacit a fine assessed upon him at the Justice Seat in the Forest of Deane. The Plea was, That the Justice Seat was begun at such a place within the Forest, and adjourned to Gloucester, which is out of the Forest. But all the Court held it good enough, then the Justice Seat being begun at a place within the Forest, it may be adjourned

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to a place out of the Forrest, &c. wherefore it was adjudged for the King.

The King *versus* Mynn.

4. **S**Cire facias. Where such Judgement was given against him, he being found a Trespasser, for cutting Trees within the Forrest without licence: And the proceeding against him being removed by Cerciorari out of the Chancery; and by Mittimus sent in Banc. Regis: He pleading such Plea, and demurrer thereupon, it was adjudged for the King.

Smith *versus* Smith.

5. **E**rror of a Judgement in Dower. The Record certified the Defendant in misericordia, and the Error intended to be assigned, was, Because the Defendant being an Infant, and appearing by Guardian, ought not to be amerced. The Defendant moved in the Common Bench to have it amended; And it was amended and made Nihil in misericordia quia Infans: And upon a Writ of Cerciorari this amendment was so certified. And it was moved by Grimston, That it should be amended in this Court, and the Judgement should be affirmed. And I doubted if such amendment might be upon diminution alledged in the Record against the Record certified in point of the Judgement. But because it being now certified, That the Record at the first was miscertified, the Court here would not intend, that it was amended after the Judgement entred, but that the Record in the Court there (in the Judgement) was well entred at the first, and not misentred. And that being in Case of Dower, and after Verdict, which were to be favoured, the Court agreed, That such Cerciorari to aide the Judgement was well awarded. And the Record was amended accordingly, and the Judgement affirmed.

William Reve *versus* Malster and Barrow. Hill, 9 Car. rot.

6. **T**respas, for entring into certain Lands called Hoo-green. Upon Not guilty, and special Verdict, whereby it appeared, That George Reve, Cophholder in Fee of the Land in question, being parcell of the Manor of Hoo, (where the Custome is, That the Land is of the nature of Burrough English, descendable to the youngest sonne) had issue three sonnes, William the Plaintiff, George and Charles, and surrendred that Cophhold to the use of himself and Anne his wife, and his heirs; and they were admitted accordingly. And afterward George the father died seized of this Reversion, which descended, secundo Jacobi, to the said Charles his youngest

youngest sonne. Anne enters and enjoys it. And after, in 12 Jac. Charles dyed without Issue. Afterward Anne, in 6 Car. died: William Reve, the eldest sonne, was admitted and entred. George Reve, the second sonne, enters and claims that land, and surrenders to the use of the Defendant Malker, who was admitted; upon whom William the Plaintiff entred: And he, and the other Defendant as his servant, re-entred; whereupon this Action was brought. Et si super totam, &c. And this matter was argued at the Barre, and after at the Bench. And it was argued at the Bench by Jones Justice, and by my self for the Plaintiff; and Justice Berkeley, and Brampston chief Justice, for the Defendant. The sole question was, Whether William Reve, sonne and heir of George Reve, who created this Reversion, and brother and heir of Charles (who had this Reversion as youngest son and heir in Borough English) Or George the middle sonne shall have this Reversion? First, It was agreed by them all, That George cannot have it, as brother and heir of Charles, by the custome; because the custome is only to extend to the youngest sonne, and not amongst brothers. Where no such custome is found: And without a special Custome found, That it shall descend to the youngest brother, the Law will not admit it; because Customs ought alwaies to be taken strictly: And so it was resolved in Ballards Case, for a Coppyhold in Totenham. Secondly, It was agreed by them all, That although Charles never was admitted, but died before admittance, it is not materiall; for it is all one as if he had been admitted; For he was a Coppyholder, and might have surrendred, or charged, or let, &c. Thirdly, They all agreed, That betwixt a Coppyhold in Borough English and a Freehold in Borough English, there is not any difference. And that if Anne the mother had died in the life of Charles, and Charles, surviving, had entred and died without issue, then William should have had the Land, as heir of Charles. But the great question was, This being a Reversion expectant upon an Estate for life, and Charles never being seized of the Lands in possession, but dying in the life of the Tenant for life, without Issue, Whether George, as youngest sonne, may claim it, or that William, as heir at the Common-Law, shall have it? And Brampston chief Justice, and Berkeley argued strongly, That George, the middle brother, should have it, and by consequence the Defendant who claimed under him, as if Charles had never been born or in esse: For there being a Reversion expectant upon an Estate for life, and the Tenant having the possession, George shall make his title from his father, and take by descent from him who had the seisin of the Freehold, and not make any mention of him who had but the Reversion expectant upon an Estate for life: And compared it to the Case of a Brother of the half blood, although the eldest Sonne survive the Father, yet he may claim it by descent from his Father, when the eldest had not possession and died without Issue, as 40 Ed. 3. 9. and 7 H. 5. 2. And if the Father died in possession,

possession, and the eldest sonne, surviving, died before entry, The second sonne, although he were of the half-blood, shall have it, he claiming by descent from his father, and never shall make mention of his brother, although in some respects he was a Tenant, to alien and change. But in all Actions and Writs where he conveys by descent, there shall not be any mention of any, but of those who took the Estate and had seisin, and not from others who never had seisin, the Law esteeming them as if there never had been any such persons: as in Fitzh. Recovery 212. & Co. lib. 8. fol. 88. Buckners Case: And by consequence he may claim here as youngest sonne by the custome, as heir in Borough English, as if Charles never had been, Because he hath it by descent, and in course of a descent. But against that Jones and my self held, That William the eldest brother had the better title, and we agreed to all the cases put of Descents, or conveyed by descent at the Common Law. But in this case the youngest sonne hath it by custome, for he being youngest sonne at the time of the death of his father, That makes him heir in Borough English by the Custome. And for this cause none can be said to be heir in Borough English to his father, so long as his father lives. See Coke lib. 6. fol. 22. Gorges Case. And when the youngest sonne is heir, in whom it vests by the Custome, It is an Inheritance fixed in him: And the custome hath his operation in him; and none may claim that after, but he who is heir unto him: And therefore we held, That the youngest sonne, who is in esse at the time of the death of his father, only shall have it by the custome. And if a man hath issue two sonnes, and being seized of Land in Borough English, dies seized of that Land, his wife *priviment enfeint* of a sonne, The sonne in esse shall have it by the custome, and the sonne born after shall not deject him, Because he was not youngest sonne at the time of the death of his father. Vid. 5 Edw. 4. 6. 9 H. 7. 15. 30. Ass. 47. If Land vests in an heir by reason of a contingencie; although another heir more near comes after in esse, it shall never be divested; and he who will after claim, ought to claim from him in whom the Estate vested. So here, This Reversion vesting in the youngest sonne by the custom, is quasi by a contingencie, and he is named heir per accidens, as in Ratcliffs Case, Coke lib. 3. fol. 38. and he is quasi a purchaser of that Reversion; wherefore when he dies without Issue, it shall descend to him who is his heir, which is the eldest sonne: And he is heir to his youngest brother, and also heir to his father, who was last seized of the Reversion; and there is no reason but he should have it as heir to his brother and to his father. And this Case is not like to the Cases put, where they claim merely by the Common Law. And whereas it was held by Brampton and Berkeley, That George the youngest sonne should have it as heir in Borough English, because he is the youngest sonne when the *Feme* died, and the reversion fell in possession, That was utterly denied by Jones and my self: For he was not youngest sonne when his father died; And none may have it by that

that Custome, but he who is youngest sonne at the time of the death of the father : For as it is said, That such an one est primogenitus ejus filius, and here at the Common Law; So in Borough English, That such a one est minime natus at the time of the death of his father, and here unto him according to that Custome : And he who is the middle sonne at the time of the death of his father, cannot be said to be the youngest sonne at that time; and therefore not within the Custome : Wherefore, &c.

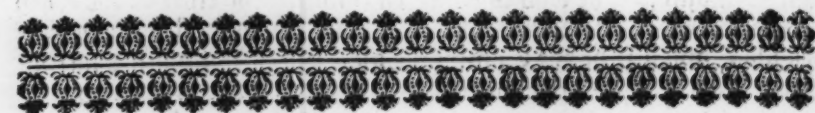
Anonymus.

ERror of a Judgement in Coventry : The Error assigned and insisted upon by Maynard, was, That the Verdict found 5 l. for damages, and 26 s. 8 d. for costs. And the Court awarded, That he should recover the damages and costs, assent by the Jury; and further, That he should recover 53 s. 4 d. de incremento ad requisitionem *le* Plaintiff, and he doth not say, pro misis suis, according to the usual course of the presidents, and it might be the incrementum was pro damnis. And all the Court (besides Berkeley) held, That it was well enough; For it shall be intended pro misis, which was the last antecedent, and that which might lawfully be increased, and not pro damnis which cannot be increased; Wherefore the Judgement was affirmed.

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Termino



Termino Michaelis, anno undecimo *Caroli* Regis
in Banco Regis.

King *versus* Fitch. Trin. 9 Car. rot. 213.

1. **E**Rror of a Judgment in Waste, in the Common Bench: Where Judgment was, upon default of the Defendant, That a Writ of Inquiry of Waste should be awarded. The first Error assigned by Maynard was, Because the Waste being assigned in three Houses, two Gardens, &c. upon the Writ of Inquiry, Waste was found in the Houses and Gardens, and intire damage given. And it was alledged, That several damages ought to be given for every of them, so that it might appear to the Court, what damages were in every of them, For if it were small in any of them, viz. under 12 d. it is so little that the Court will not adjudge it Waste, and being assigned in several Houses, it ought to appear to the Court how much is the Waste of every of them, by it self particularly, Vide 9 H. 6. 67. Sed non allocatur; For when the Sheriff and Jury have had the view, and given damages for the Waste, it shall not be intended petit damages in any: And the usual course is in all presidents to finde intire damages. The second Error, Because upon the Writ of Inquiry of Waste, thirteen Jurors were returned to be sworn, where there ought to be but twelve; For it is not like to other Writs of Inquiry, where it is usual to have more than twelve, at the Sheriffs pleasure, for that is but a mere Inquest of Office: But here it is a verdict, and in nature of a Verdict, whereof an Attaint lyes, Vide 3 H. 6. 29. Et adjournatur, postea 452.

Acton *versus* Symon. Mich. 10 Car. rot. 83.

2. **A**Sumpsit. That the Defendant, the twenty fift of April anno 3 Car. in consideration the Plaintiff would demise unto the Defendant, the moitie of an House and certain Lands, for three years, for the rent of 25 l. per annum, payable at Mich. and the Annuntiation, assumed to pay the said rent at the said Feasts. And alledges in fact, That postea the same day, he demised the said Lands to the Defendant in forma prædicta, and that he enjoyed the Land accordingly during the three years, and had not paid

paid his rent. The Defendant pleads a surrender of the said Lands, before any of the Feasts, for which the breach was assigned, and acceptance thereof: And hereupon, they were at issue and found for the Plaintiff. And it was now moved by Grimston, in arrest of Judgment, That the Action lyes not, because it is grounded upon a personal promise in a real contract, which real contract being executed, the Assumpsit, which is merely personal, is determined; and the rent being real, he cannot bring this Action for the non-payment thereof. But Jones, Berkeley, and Brampton chief Justice conceived it lyes; For it is a collateral and absolute promise: But if it had been an implied promise (as upon a sale of Goods, &c.) This Action lyes not. But there being an express and direct promise alledged, which is in a manner confessed by the Defendant, by his Plea in Barre, The Action lyes, as if he had covenanted by Deed, or were obliged by an obligation to pay the rent, and so this promise is good. But I doubted thereof, Because it is a personal contract. And by the Lease made, the personal contract is determined; For it is in vain to have an Assumpsit, where he may have Debt upon the Lease, and thereby recover the debt and damages for the forbearance: And in this Action no *gager d' ley* lyes, and then there is no cause to have this Action. And Germyn urged, That if this Action were maintainable, then the Defendant could not plead eviction or suspension of the rent, by entry in part of the Land. But all the Court denied it; For notwithstanding this promise, it is a rent as before. And if it be determined as a rent, the promise for the rent is also discharged; Whereupon by the said three Justices, it was adjudged for the Plaintiff. But we all agreed, That there ought to be an express promise proved, if he had pleaded non Assumpsit, and that an implied promise would not have served. And Berkeley held, That if he recovered damages to the value of the rent arrear, it may be pleaded in Barre to an Action of Debt for the rent. But Brampton and I denied it. And Berkeley said, If one borrow money, and promise to enter into bond to pay it at a day to come, and promise that he will keep his day of payment, and afterwards he makes an Obligation for the payment of this Money at the day, if he say of the payment, Debt may be brought against him, upon the Obligation, and he may also maintain an Action of the Case upon the promise. But I denied it, Because the Obligation determines the Contract.

Done *versus* Smethier and Leigh. Trin. 8 Car. rot. 1310.

Error to reverse a fine in Chester 2 Car. Betwixt Smethier and Leigh demandants, and Sir Rich. Done, and Sir John Done and Margaret his wife, and John Done their sonne and heir apparent, deforciant, &c. The Error assigned was, Because the Writ of Covenant was directed to the Coroners, with this clause in the
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end of the Writ, *Quia prædictus Joh. Done Miles, est Vicecomes Comitatus Cestrie, fiat executio Brevis prædict. per Coronator, ita quod Vicecomes non se intromittat*, where the Writ ought to have been directed to the Sheriff, &c. And this was divers times argued at the Barre, and much insisted upon, by Calchorp, Maynard, and others, who argued at the Barre for the Plaintiff in the Writ of Error. And first they said, That if the Sheriff had been the sole party to the fine, yet the Writ ought to have been directed unto him, because it is but a summons, and the Sheriff may summon himself. Also it is not returned, That he is Sheriff and cannot summon himself; and the course of Law is, that the Writ shall be directed unto the Sheriff, and not unto any other, when it may be done without prejudice. And that the Writ is abateable where it is directed to the Coroners, &c. Vid. 18 H. 8. 3. 9 H. 6. 12. The second reason, Because that the Sheriff is not the sole party, but others are joyned with him, &c. And all the Court resolved, That it was not Error; For if the Writ be directed to the Sheriff, and he is party, it is doubted in the Books, if the Sheriff, as Plaintiff, may execute a Writ for himself; and, as Defendant, may execute a Writ upon himself. And therefore it were good, to avoid that doubt, to take a Writ directed to the Coroners, as well where the Sheriff is Plaintiff, as Defendant, upon surmise thereof in Chancery, at the time of suing the Writ. And it is the general course to award the Writ to the Coroners, to avoid the doubt of delay; For if he be Plaintiff and makes not such surmise, the Defendant peradventure will take exceptions in abatement of the Writ; And so if he be Defendant he may peradventure plead in abatement of the Writ, and cause him to have a new Writ. But when it is awarded to the Coroners, if the Defendant would have excepted against it (as peradventure he might in some cases) yet when he appears and accepts thereof, and comes and levies a Fine thereupon, he never afterwards shall assigne for Error, that the Writ ought not to have been directed to the Coroners, especially upon this amicable Writ to make assurance, &c. Vid. 34 H. 6. 29. 12 H. 4. 24. 8 H. 6. 28. 2 H. 6. 12. Fitzh. N. Br. 98. 11 Ed. 4. 7. 3 H. 6. 2. Another Error was assigned, That the Writ of Covenant in the Certificate is, *si fecerit eos secur. &c.* where it ought to be *vos*. But upon view of the retourn of that Writ certified from Chester, it was *vos*, whereupon it was awarded, That the Roll should be amended, and the Fine was affirmed.

Downs *versus* Hathwait.

4. **D**Ebt upon a Bond de quinguinta duabus libris: The Defendant pleads non est factum. The Jury find the Bond to be quinguinta duabus libris, with a condition to pay 26 l. and that the Defendant delivered that as his Deed to the Plaintiff: And if that be the

the Deed of the Defendant, as is mentioned in the Declaration, they pray the discretion, &c. And upon motion the Court held it to be found for the Plaintiff; for quinginta is all one with quinquaginta, as viginta pro viginta, whereupon rule was given; That Judgement should be entered for the Plaintiff, unless, &c. And afterwards being moved again, another exception taken, That the Bond and the Declaration were John Hathwait, and the Roll is Joaes. Sed non allocatur; but adjudged for the Plaintiff. Quod vide postea pag. 418.

Needler *versus* Symnell and his Wife. Trin. 11 Car. rot.

Action upon the Case, for words. Whereas the Plaintiff was of good name and fame, and a Citizen and freemen of London, and for twenty years had used, and yet useth the Trade of selling of without any deceit, That the Defendants wife said these words, Thou art a Cheater, and hast cheated my Husband of 500 li. The Defendants pleaded, Quod ipsi non sunt inde culpabiles, and found for the Plaintiff, and damages forty pounds. And it was now moved in arrest of Judgement, first, That the issue was not well joyned; for being for words of the wife, the Issue ought to have been Ipsa non est inde culpabilis. Sed non allocatur; For the Baron and Feme are charged as for the wrong of the Feme: So the issue, Quod ipsi non sunt inde culpabiles is well enough. Secondly, It was moved, That for these words an Action lies not; for the words doe not touch him in his Profession, as a Tradesman, nor are applied unto him for cheating him in his Trade; but it may be that he cozened or cheated him at Dice, or by sale of Land: And to say, That one cozened or cheated him, an Action lies not, no more for a Tradesman than for any other person: And it hath been so resolved and adjudged in Sir William Brunkers Case, and Gorges Case. And of that opinion was all the Court, they delivering their opinions seriatim; wherefore Rule was given to enter Judgement for the Defendant, unless, &c.

Doctor Sybthorps Case.

Action for words. For that the Defendant, at Burton-Lazers Church, spake these words: See, Doctor Sybthorp is robbing the Church: And afterwards, at another day, spake of the Plaintiff, Doctor Sybthorp hath robbed the Church (innuendo the Church of Burton-Lazers.) After Verdict for the Plaintiff, Bagshaw moved in arrest of Judgement, That for the first words an Action lies not, Because he doth not charge him with an Act done, but in attempting to doe an Act. And for the last words, That it lies not, Because it doth not mention what Church, nor of what thing; and it may be in taking away the Leads, or such things, which be not felony; or, as the common speech is,

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For not paying his Cythes. Sed non allocatur: For all the Court held, That for both speeches an Action lyes; for it is to be intended in the worse part, being spoken maliciously to slander him; and that it was for the taking of such things as is a felonious Act. And although it was objected, That robbing the Church is an intention to do an Act, and is not felony. And to say, That he attempting to doe an act cannot be felony, and therefore no cause of Action; Berkeley said, That for saying such a person is robbing such a man, or ravishing such a woman an Action lyes. So here: Wherefore it was adjudged for the Plaintiff. Vid. Pasch. 5 Jac. betwixt Benson and Morley adjudged, that for these words, Thou hast robbed the Church, innuendo the Church of Almage, an Action lyes.

The Case of Downs and Hathwait, Ante pag. 416.

7. **W**As moved again. Rolls for the Defendant, first, That there is a variance betwixt the Obligation and the Declaration; for the Declaration is, That Johannes Hathwait *suit oblige*; and the Obligation is Joaem, without any dash or prick over it; So it cannot be the same Obligation whereof he declares, and the Bond is void for the insensibility; for Joaem is not any name. Sed non allocatur; For it is the same word, and shall be intended Johannem abbreviated. And an Obligation shall not be avoided by vicious writing or incongruity. Secondly, He moved, That quinginta is not a word of any certainty, and especially it cannot be taken for quinquaginta, for it wants the syllable (qua,) and if it hath any sense, it is rather to be taken for five hundred than for fifty. Sed non allocatur; For it cannot be taken for five hundred, because it is not genta, which is taken for a hundred; and it hath sufficient intendment to be fifty, by the condition to pay six and twenty pounds. And a case was remembred, That an Obligation of septingint was taken for septuagint, and not seven hundred, nor void. So here: Wherefore it was adjudged for the Plaintiff.

Baker and Unica his Wife *versus* Brereman. Pasch. 11 Car. rot. 152.

8. **A**ction upon the Case. Whereas the wife, before marriage, was possessor of a Lease for years, of a Close in St. Martins, in which Close a Stable was formerly erected, and now an house there builded; and that the Defendant was occupier of another Close called the Yard, in the said Parish of St. Martyns, near adjoining to the Plaintiffs Close: And that within the said Parish there is, and time whereof, &c. was a custom, Quod omnes occupatores of such a Close of the Plaintiffs à tempore cujus contra, &c. habuerunt & habere consueverunt, for them and their servants, quandam viam tam pedestrem quam equestrem at all times of the year for all Carts and Carriages from the said Close of the Plaintiffs in

in vel ultra the Closse called the Yard, ad vel in a place usually called the Leystall in St. Martins aforesaid, & sic retrorsum from the said place called the Leystall & in ultra the said Closse called the Yard, usque ad the Closse of the Plaintiff. And the said Unica his wife so being possess, and having the occupation of the said Closse, That the Defendant, to hinder her of her way, and totally to exclude her, such a day and year, erected a building upon the Closse called the Yard ex transverso viæ prædictæ, that she might not have nor use the said way: And that afterward she married the Plaintiff Baker, and that they, after the marriage, could not use the said way, to their damage of fourty pounds. The Defendant pleads Not guilty, and found against him. And now it was moved in arrest of Judgement by Hutchings, first, That such a custome within a Parish alledged for an occupier of such a Closse, to have a way, &c. is not good; but he ought to prescribe in him who hath the Inheritance: And that a custom in a Parish cannot be well applyed to a Closse in the Parish, 21 Eliz. Dy. 363. Cok. Lib. 6. fol. 59. And of that opinion was all the Court. And although Rolls alledged, That he cannot otherwise prescribe, because one man was once owner of the Inheritance of both Closses; and unсты may not destroy the way; but that it is reviv'd by the disseverance, as vicesimo primo Edvardi tertii fol. secundo. It was answered thereto, That it ought to have been so specially shewn, which doth not appear here, and peradventure it will not serve in case of a way, but in case of necessity, as a water-course betwixt two houses, or peradventure Inclosure or such things which are of necessity, there he may so prescribe, and the party ought to except them in his conveyance, Vide undecimo Henrici septimi, fol. vicesimo quinto. And all the Justices held, That Inhabitants may alledge prescription for a way to a Church or Market, which are of necessity, and in matter of discharge, as in modo decimandi, or to be quit of Toll; but not in matter of profit or charge in another soyle, as Coke lib. 6 fol 59. in Gateways Case, 8 Ed. 4. 5. For Fishermen to dry their Nets, for the publick benefit or for easement, as 15 Ed. 4. 29. & 18 Ed. 4. 3. The second exception, Because the Feme joynd with the Baron in the Action for the stopping during the coverture, which ought not to be. Sed non allocatur; Because the wrong was done to the Feme, and the Baron had it in right of his Feme. But for the first exception it was adjudged for the Defendant.

Hutchman *versus* Porter, Ante pag. 286, & 315.

WAs now moved again: And the Court agreed, That the Judgement was good; For it cannot be intended, that he was acquitted of any other matter; therefore he was acquitted inde and it is certain enough; and the *Writ* in Fitzh. N. B. 114. of Conspiracy, is acquietatus, and he doth not say inde;

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and the presidents are both wayes; for the two presidents in the Old Book of Entries, fol. 123. is acquietatus, omitting inde: And although the other presidents which are acquietatus inde, are the surest way, that doth not prove but where inde is omitted, it is good enough: Whereupon all the four Justices resolved, That the Judgement was good, and affirmed it accordingly.

Spencer *versus* Medburne and his Wife.

10.

Action for words. Whereas the Defendants wife, having communication with J. S. of the Plaintiff, and intending to deprive him of his good name and fame, and draw him into perill of his life, such a day and year spake of the Plaintiff *hæc anglicana verba*, Goe tell my Landlord (innuendo the Plaintiff) he is a Thief, And I will cause him (innuendo the Plaintiff) to be hanged. The Defendants pleaded Not guilty, and it was found against them. And now Farrer for the Defendants moved in an arrest of Judgment, Because it is not alledged nor averred, That the Plaintiff was her Landlord; and that the innuendo will not help it. But Taylor for the Plaintiff argued, For as much as it is layed, that communication was by the Defendants wife of the Plaintiff, and upon that communication it is alledged, That the wife said, *de eodem querente*, the said words, Goe tell my Landlord (innuendo the Plaintiff) it is a certain description, that they were spoken of the Plaintiff: And when the Jury hath found them guilty, it proves that the words were spoken of the Plaintiff, who was her Landlord; otherwise it could not be found to be spoken of him. And of this opinion was Justice Jones and my self. But Berkeley and Brampton chief Justice doubted thereof: For if the Declaration in it self is not certain by an innuendo to be spoken of the Plaintiff, the Verdict can never aid it. And it is not here shewn, that the Plaintiff was her Landlord; and she might have more Landlords; and non constar of whom she spake: Wherefore Curia advisare vult. And after it was advised, to avoid further question, That the Plaintiff should relinquish this Action, and amend this fault in the second. And it was so ordered by consent.

Price *versus* Parkhurst and others.

11.

Error of a Judgement in the Common Bench. Whereas an Action of Debt was brought by six Executors named in the Writ; and after three of them being summoned and severed, The three others bring Debt upon an Obligation made to the Testator. The Defendant pleaded Non est factum, and found against him, and Judgment for the Plaintiff. And now assigned for Error by Germin, Because there is not any mention therein of those which severed, for they

they being alwaies Executors, ought to be named in the Judgement. And it was commanded, that they should search the preſents in the Common Bench, what the courſe was there, whether upon ſummons and ſeverance, Judgement onely ſhall be for thoſe which proſecuted? And it was certified by the three Prothonotaries, That the courſe was ſo. And the Court (abſente Brampton) were of opinion, That it is a good courſe, and no cauſe of Error; for the Executors which are ſevered, peradventure never proved the Teſtament, and it may be never will prove it or Adminiſter: therefore when they are named in the Wiſt, and will not joyn, it is reaſon Judgement ſhall be onely for thoſe which proſecuted, without naming thoſe which are ſevered: Whereupon rule was given, That Judgement ſhould be affirmed, unleſs, &c.

Smith *verſus* Smith.

ERror of a Judgement in the Common Bench. The Error assigned, Becauſe the Venire facias was returned by Sir Richard Saltingſton, Sheriff of Eſſex, in Craſtino Martini, nono Caroli; and that then in Craſtino Martini, nono Caroli, the ſaid Sir Richard Saltingſton was not Sheriff, but one Henry Smith. The Defendant in the Wiſt of Error ſaith, That Sir Richard Saltingſton was made Sheriff of Eſſex before the return of the ſaid Wiſt, viz. decimo Novembris, nono Caroli, by the Kings Patent, dated decimo Novembris, prout patet de recordo. Upon *Nul tiel Record* pleaded at the day, he produced in Court the Letters Patents, whereby he was made Sheriff. And it was moved by Maynard, That this ought to be tried *per pais*, whether he were Sheriff at ſuch a day, and not by the Record of the Patent: For he might be diſcharged before the day. Sed non allocatur; For it ſhall not be intended, unleſſe it were by pleading ſhewn unto the Court: Wherefore the Judgement was affirmed.

12.

Horn *verſus* Barbar.

DEbt upon an Obligation. The Defendant demands Oyer of the condition, which was, That if he payed the rent, reſerved upon a Leaſe of a Mill and certain Lands during the term of thirteen years, at the Feaſt mentioned within the Leaſe, or within ten dayes, or within ſix moneths, (according to a latter agreement betwixt them) then the Obligation ſhould be void. The Defendant pleaded the Indenture verbatim, which was of the Leaſe of a Mill and certain Lands mentioned therein, reſerving the rent of 40 l. per annum, at the four uſual feaſts, or within ten dayes after: And he pleaded, That he hath performed all the covenants, payments, and agreements conteined in the Indenture,

13.

denture, secundam formam & effectum Indenturæ et conditionis prædictæ. And upon this plea, the Plaintiff demurred: And Keeling for the Plaintiff shewed for cause; for that the Condition is in the disjunctive, viz. at the four feasts, or within ten dayes after every feast, or within six moneths (according to the agreement) and therefore he cannot plead payment generally, for he hath election to pay it, at which of those dayes he will. I was of opinion, That the Defendant might plead payment generally. But Jones and Berkeley against it, Because the Obligation refers to one of the three times, viz. the four feasts, or within ten dayes after every of them, or within six moneths, where he hath election upon which of those dayes he will pay: And he pleading, That he hath performed the covenants, payments, and agreements, it is no Plea to this condition; Wherefore they gave Rule (absente Brampton) That Judgement should be given for the Plaintiff, unless, &c. Vid. 21 Ed. 4. 12. & 44. Keyleway 95. 38 H. 6. 26. Cok. lib. 8. 33. Cok. Lit. 303. 5 H. 7. 9. 22 Ed. 4. 44. And afterwards Judgement was entered accordingly.

Sydowne *versus* Holme.

14.

Prohibition. Surmising, That the Prior of Bristol was seized in fee of such Land parcell of his Priory, and that he and all his Predecessors, time whereof, &c. untill the dissolution, held the said Lands, being parcell of the demesnes of the said Priory, discharged & acquitted from the payment of Tythes, for his Fermors and Tenants for life or years of the said Lands, &c. And that the said Priory was dissolved by the Statute of 27 H. 8. and that the said King was seized in fee of the said Lands, &c. and shews the Statute of 32 Hen. 8. (that none shall be sued for Tythes, who were discharged by the Laws and Statutes of the Realm) and the Statute of 2 Ed. 6. And that King Henry the eight dyed seized of the said Lands, and so conveyes it by mean conveyance to Edward Bartell, and to the Plaintiff, as his Tenant for years: And that the Parson of Bristol sued him for Tythes, and upon that Prohibition the Defendant demurred in Law. And after arguments at the barr, it was argued at the Bench. The first question was upon this discharge, being shewn to be, time whereof, &c. in a Spiritual person, viz. the Prior, Whether this priviledge thereof be determined by the dissolution of the Priory, or still remains, and may be in the King and his Patentee, without the ayd of the Statute of 27, & 31 H. 8. And I argued, That in regard it was discharged, time whereof, &c. in a Spiritual person (viz. the Prior and Convent) who were capable to have or to be discharged of Tythes, it being a priviledge vested in them, before the Councell of Laterane, (which was before any parochial right) it may by intendment be by composition

position reall, then it shall goe with the Land, as 8 Ed. 4. 11. & N. B. 41. That any Lay-person may have a composition, and there-upon may have a Prohibition, much more a Spiritual person may have it, by this means, &c. and it shall goe with the Land, Vid. 7 Ed. 3. 3. 10 H. 7. 18. That a Spiritual person may make such a prescription; and then being a prescription, fixed in a spiritual person. By the dissolution, it comes to the King being persona mixta, and from him to his Patentee, as Cok. lib. 2. fol. 44. the Bishop of Winchester's Case, and Cok. 11. fol. 12. Priddle and Nappers Case. But Bramstone, Jones, and Berkeley, argued to the contrary, yet they agreed, That it shall be intended, that such discharge was by Composition reall, and shall goe with the Land, as the Case put of a common person, which is, that a Lay-person shall have advantage of a reall composition, if he can shew it. But because a Spiritual person may have divers causes of privileges, by grant, as well as by composition, and that in divers manners, it shall be intended the most general course, which is a personal discharge, which determines with their Corporation, as in 3 Edw. 3. 11. And in favour of the Church, it shall be intended, that it was rather by grant of privilege, than by any real composition, and that the tythes are due to the Parson, and shall not be taken from him, unless that the discharge continue, which is not here shewn. The second main question was, Admitting that this discharge is by privilege granted to the Priory, which being one of the inferior Abbeyes, came to the King by the Statute of 27 H. 8. being out of the value of 200 l. per annum, Whether this privilege be not merely determined, Or whether it is not revived by the Statute of 27 H. 8. & 31 H. 8? And in this point I argued, that it is ayded by the Statute of 27 H. 8. because that gives the possession of the Abbeyes to the King, in as ample and large manner as the Abbot had them, at the time of the dissolution, and it was discharged at the time of the dissolution. And if it be not ayded by the Statute of 27 H. 8. yet it is to be ayded by the Statute of 31 H. 8. by the general clause, which is, That the King and his Patentees of any Monasteries, &c. shall have and enjoy the same, discharged of the payment of Tythes, &c. as the late Abbot, &c. had, held, and enjoyed, &c. And whereas it hath been objected, That this Statute extends only to Abbeyes, which came to the King after the fourth of February 27 H. 8. But this Abbey came to the King the fourth of February 27 H. 8. and so excluded out of this Statute. I answered thereto, That this Statute extends to Abbeyes surrendered, relinquished, renounced, or given up to the King after the fourth of February 27 H. 8. And that is intended to extend to all Abbeyes, which are given by the Statute of 27 H. 8. for although it hath not relation to the fourth of February 27 H. 8. yet that is but a foreign surmise, by such relations to prejudice the King, as it is Cok. lib. 3. fol. Relations are but fictions, which shall not prejudice the King by such constructions; and in rei veritate

veritate all the said Abbeyes were surrendzed, or relinquished after the fourth of February 27 H. 8. or during that Parliament: And the exposition hath alwayes been, That this clause extend as well to Abbeyes which came after the Statute of 27 H. 8. as to the superiour Abbeyes, and never any question made in these times, or in sixty years after the making of the said Statute. And therefore the cases in 7 Eliz. rot. 245. betwixt and Hayant in this Court, and Pasch. 27 Eliz. rot. 328. betwixt Cogall and Fairfax in this Court, and Pasch. 37 Eliz. betwixt Smith and Patenson were cited, where Prohibitions were granted upon surmise, that the Lands came to the King by the Statute of 27 H. 8. and that in 40 Eliz. rot. 679. betwixt Berley and Walter a Prohibition upon the surmise, for this Land was granted; where it being in question, Whether where continual usage had been, that as well for inferiour Abbeyes given to the King, by the Statute of 27 H. 8. as to Abbeyes which came after, and held their Lands discharged, such Prohibitions should be granted? I held it to be an equal mischief, as well for the one, as for the other, and that the Statute extends equal remedy. And so the exposition hath been alwayes taken by the practise. But Brampton chief Justice, Jones and Berkeley argued to the contrary, That the Statute of 27 H. 8. doth not preserve or revive this privilege, because there be not any words, that it shall be discharged as the Abbot held it, but that the King shall have it, in as ample manner and form as the Abbots held it. And general words will never preserve the privilege, and immunities which were determined, unlesse by special Statute they be revived: And the Statute of 31 H. 8. doth not extend unto them; for all the scope of the said Statute, is only to extend to Abbeyes which came to the King after the fourth of February 27 H. 8. And all Abbeyes which came to the King by the Statute of 27 H. 8. came unto him after the fourth of February 27 H. 8. And to those the Statute of 31 H. 8. doth not intend to extend; For in every Branch are mentioned onely the Abbeyes, &c. which came to the King after 27 H. 8. And although this clause to be discharged of Cythes, in the body of the said clause, is any Monasteries, &c. yet it is after the said late Abbots, &c. and Abbots be not mentioned before in that clause; and therefore it ought to be expounded and coupled with the clauses before, which mentions and intends only what came to the King after the fourth of February 27 H. 8. and doth not extend to Abbeyes, which came to the King the fourth of February 27 H. 8. And Jones said, Although it is no Statute untill the end of the Sessions when the King assents, yet when there hath been a Session, it shall have such relation to the first day of the Sessions, that they vest actually in the King the said fourth day of February 27 H. 8. That the King shall have the rents incurred after the first day, and before the last day: And if they be paid in the interim to the Abbot, they shall be paid again to the King. And Jones and Brampton relied upon a Judgement 18 Jac. in the Common Bench betwixt Gerard and Wright,

Wright, where it was held upon solemn argument, by Hubbert, Winch, and Hutton, Justices, That the Statute of 31 H. 8. doth not extend to Abbeyes which came to the King, by the Statute of 27 H. 8. And that in this Court in the case of Whitton and Weston, for the possessions of the Abbey of Saint Johns of Jerusalem, 4 Caroli, where the question being, Whether the said Abbey came to the King by the special Act of 32 H. 8. All the four Justices agreed, That the case of Gerrard and Wright was good Law, That the Abbeyes which came to the King, by the Statute of 27 H. 8. were not within the privilege of 31 H. 8. nor to have the benefit of that Statute. And Berkeley Justice insisted much, That this privilege to be discharged of Cythes, being a mere personal privilege, was determined by the dissolution of the Abbeyes, and tyed onely to their bodies and persons, nor can be revived without especial words, which are not in the Statute of 27 H. 8. And that although the Statute of 31 H. 8. extend to the said Abbeyes suppressed by the Statute of 27 H. 8. yet there is a saving in the said Statute of 31 H. 8. of all rights and interests besides, to the Donors, Abbots, &c. Wherefore for the reasons before, but principally for that the Abbey dissolved appeared to be suppressed by the Statute of 27 H. 8. By the opinion of the said three Justices, it was adjudged for the Defendant; And that consultation should be awarded.

Smith *versus* Smith. Mich. 10 Car. rot. 142.

ERror of a Judgement in Formedon in Remainder in the Common Bench; Where the Judgement being for the defendant, and the Judgement in this Court affirmed; Whitefield Serjeant moved to have costs assessed to the Defendant in the Writ of Error, because that this Writ was brought before execution, and thereby the execution delayed according to the Statute of 3 H. 7. But it was resolved, That for as much as there were no costs nor damages recovered nor allowed in the first action; so that no execution is delayed, but onely for the Land, that in this case no costs are allowable by that Statute; Whereupon it was ruled accordingly.

William Byrte *versus* Manning.

DEbt upon an Obligation, conditioned for performance of Covenants. The Defendant demands oyer of the Condition, and pleads performance. The Covenants were, That Thomas Byrte, sonne of Will. Byrte, should espouse Anne daughter of the said Manning: And in consideration of this marriage, Manning covenanted to pay 300 l. And William Byrte covenanted to assure such

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Lands to the said Thomas and Anne, for her Joynture. And there were other Covenants for the value thereof and quiet enjoyment. And amongst others, Manning covenants, That he will procure the said Thomas Byrte to be presented, admitted, instituted, and inducted into such a Benefice upon the next avoidance of the said Church. And the breach assigned was, for not performance of the said Covenant of procuring him to be admitted, instituted, &c. And upon this breach assigned, the Defendant demurred, Because this Covenant is against Law, being a symoniacal agreement; And a Bond for performance thereof is not good. But all the Court held, That if it had appeared to have been, that in consideration of the marriage of his sonne, &c. he would procure him to be presented, admitted, instituted and inducted into such a Church, That had been a symoniacall Contract, and had avoided the Obligation. But here this Covenant is not in consideration of the said former Covenants, nor depending upon them, But it is a mere distinct Covenant by it self, and independant upon the former: And without speciall averment or shewing, That it was a symoniacal Contract, it shall not be so intended. But it may be a Covenant upon good consideration; Wherefore it was adjudged for the Plaintiff.

Tyffyns versus

17. **E**rror of a Judgement in the Common Bench. The Error assigned was, because the Action was brought against two, and issue joyned by two Defendants; And after Issue joyned, one of the Defendants died, notwithstanding there was a Venire facias awarded to trye the issue betwixt the Plaintiff and the said two Defendants: And the Venire facias and Habeas Corpora, and the Issue found, mentions, That it was betwixt the Plaintiff and two Defendants. And although it be surmised, that he died before Judgement, so no Judgement is to be given against him, yet he ought to have surmised it before the Issue tryed; and therefore Henden Serjeant, very much urged it to be an Error. But it was resolved by all the Court, That such surmise needs not to be in judicial process to alter it: And therefore although a Venire facias issued against a dead person, yet one of the Defendants being alive, is sufficient, and no cause of Error. Vid. 3 H. 7. and 4 Hen. 7. 7. for this point: Whereupon the Judgement was affirmed.

Digbie versus White.

18. **D**ebt upon an Obligation of 20 l. dated 24. Junii 9 Caroli. The Defendant pleaded, That the Plaintiff 22 Februarii decimo Caroli, released unto him all Actions and Demands which he had, &c. The Plaintiff demands oyer of the release, which was a Re.

a Release of all Actions unto the 14. of January, before the date of the Release. So it is not a Release of all Actions, untill the day of the Release. And for this misprision, the Plea was adjudged ill, and the Plaintiff had Judgement.

Stone *versus* Newman in the Excheq. Chamb. Pasch. 7 Car. rot. 115.

19.

REplevin *sur* Demurrer in Banco Regis. The Case was such, Sir Thomas Wyat was Tenant in tale to him and his heirs males of his body, of the gift of King Henry the eighth, Reversion to the King in fee; And he being so seized, infeoffed thereof George Moulton and his heirs, tricesimo quinto Henrici octavi, to the use of him and his heirs: He had issue George Wyat, who had issue Sir Francis Wyat, in whose right the Defendant distrained for damage feasant, and made conuſance. The Plaintiff shews, That the said Sir Thomas Wyat, who made this feoffment in primo Mariae, was attainted of treason and executed: And this attainder was the same year confirmed by special Act of Parliament: And by speciall words, That he should lose and forfeit all his Lands and Tenements; And that they should be vested in the Queen and her Successors without Office. Upon all this matter disclosed in pleading, the question was, Whether after this feoffment Sir Thomas Wyat had any estate or right remaining in him, which is not forfeited and given to the Queen by this attainder and Act of Parliament? For if it be forfeited, the Plaintiff who claims under the Queens Patent, is in, and hath good title, and Judgement ought to be given for him: But otherwise, Judgement ought to be given for the Defendant, who claims under Sir Francis Wyat, the Issue in tale. And after divers arguments in the Kings Bench at the Barre, although there was not any variety of opinions of the Justices of the Kings Bench discovered, yet because it was a Case so long controverted, and the same Case in substance which was reported by M^r. Plowden in Walsinghams Case adjudged in the Exchequer; and after ward in the Common Bench to the contrary in Aukins Case, The Court adjourned it into the Exchequer Chamber to be argued before the Justices & Barons of the Exchequer. And after divers arguments at the Barr, it was argued solemnly in the Exchequer Chamber by all the Justices and Barons of the Exchequer, besides Richardson chief Justice, who died whilst the argument was depending, and Brampton made chief Justice, And it was argued by Ric. Weston puisny Baron of the Exchequer, and by Sir Francis Crawley puisny Justice of the Common Bench the first day, for the plaintiff. And upon the second day by Sir Rob. Berkeley puisny Justice of the Kings Bench, and Sir George Vernon Justice of the Common Bench, for the Plaintiff; and afterwards upon a third day by Sir Tho. Trevor Baron of the Exchequer, for the Plaintiff, and by my self for the Deft. And after, upon a fourth day, by Jones, & Hutton Justices, for the Deft.

And after upon another day, by Baron Denham for the plaintiff, and at another day, by Sir Humphrey Davenport for the Plaintiff, and after upon another day in this Term, by Sir John Fynch chief Justice of the Common Bench for the Defendant (but I being sick at the time of his argument, did not hear it :) And Brampton chief Justice did not argue, because he was made chief Justice after the Argument begun ; And the chief Baron and other the Justices and Barons, which argued on the Plaintiffs part, much insisted upon the Argument and reasons given by Sanders in *Walsinghams Case*, *Plowd. Commentarie*. First, Because it being a feoffment by Tenant in taile of the gift of the King (the Reversion remaining in the King at the time of the feoffment) there is no discontinuance of the Estate taile ; for it cannot discontinue the Reversion in the King : and therefore the Estate taile remained in him at the time of the attainder, and the forfeiture thereof vested in the King by the Statute of 16 H. 8. (Note, They all agreed, That if Tenant in taile of a common person makes a feoffment, where no Reversion is to the King, it is a discontinuance ; and if he be attainted of Treason, there is no forfeiture to the King, as *Co. lib. 3. Marqueste of Winchesters Case* is. Secondly, That if the Estate taile be not in him to be forfeited, yet the right of the intaile remains, which is forfeited and given to the King by the Statute of 33 H. 8. or by the private Act made in primo Mariae, which gives all Estates and Rights, &c. And although that a feoffment gives all Estates, Interests, and Rights, in case where Tenant in fee makes a feoffment, yet it is not so in case of a feoffment made by tenant in taile, because the Estate taile is an Incident inseparable to his person and blood, and cannot be transferr'd to any other : Which is the reason, That one cannot plead a Que Estate of a Tenant in taile. The third reason, Because the privy of Estate remains betwixt the Donor and him, and cannot be transferred over ; and much more stronger, where the Reversion is to the King, the privy remains in him, for the benefit of the King : Which is the reason, That the Donor may avow upon him for his rent, and shall not be compell'd to alter his Avowry, as 48 Ed. 3. 8. 5 Ed. 4. 34. 4 Hen. 4. 32. And that if his heir within age recovers in a Formedon, he shall be in ward : And in case of the King, where Tenant in taile, remainder in the King, makes a feoffment, yet his heir within age shall be in ward to the King before entry or recovery, as *Fitzh. Nat. brev. by reason of the privy betwixt the King and his Tenant in taile*, which cannot be altered. The fourth reason, which they much insisted upon, was, That the right alwaies remained in him, and is forfeitable by the Statutes of 33 H. 8. and primo Mariae : For the ~~What~~ of Formedon in the descender supposeth quod descendit jus ; and the Declaration mentions as much, which alwaies ought to comprehend truth ; which proves, That the Law accounts the right to be in him, and from the father descended to his sonne, and then, being in him, it is forfeitable by his attainder of Treason. The fifth

fifth reason, That it is for the greater benefit of the Crown, to expound it most strongly against Traytors and their Issues, for the Kings profit and discouragement of Traytors, that they should not hope their Issue should inherite: And they much relied upon the Judgement in print in Plowd. Comm. in Walsinghams Case. And they said, Although it were questioned by a Writ of Error, yet it was affirmed, and the Land enjoyed allwayes after the Judgement, And upon the Case of the Lord Sheffield, 21 Jacobi, which was adjudged upon a Writ of Error, brought in the Exchequer Chamber, where the judgement was, That the Land of Tenant in taylor, after a feoffment was forfeited to the King. But against that it was argued, by Justice Hutton, Justice Jones, and my self, and by the Lord Finch (as I heard concurring with our reasons) That the Judgement ought to be given for the Defendant. First, That although the reversion is in the King, and there is no discontinuance, yet all is divested out of the feoffor, as strongly as if there had been a discontinuance: And if it had been a feoffment by Tenant in taylor, the reversion to a common person, After such feoffment and discontinuance, nothing remained, and nothing can be forfeited, as it is agreed, in Coke lib. 3. fol. 2. the Marquess of Winchesters case, & there fol. 10. Doubryes case, that right of entry is only forfeited, and not right of action: And although it hath been much insisted on by the other side, That when there is no discontinuance, no Estate passeth, but for the life of Tenant in taylor, so that the reversion of the Estate and the right remain in him; and urged it out of the words of Littleton, That no estate passeth but for the life of Tenant in taylor. Yet it was thereto answered, That clearly an Estate in fee passeth to the feoffee, descendable from him to his issue, and whereof the wife of the feoffee shall have Dower, and the feoffee shall have after a recovery by default a Writ of Right, and a Quod ei deforciat, And the intent of Littleton is, That the feoffee or grantee of the reversion hath no more right to the Estate, than for the life of Tenant in taylor. But the fee in the interim passeth to the feoffee, as in case of exchange, 9 Ed. 4. 22. 8 H. 6. 23. and in the case of the grant of a reversion, 24 Ed. 3. 28. 13 H. 7. 10. 21 H. 7. 41. and Co. lib. 10. fol. 96. Seymors case, and Cok. lib. 3. fol. 84. and in the case of Fines, and 22 Ric. 2. Discontinuance 50. and Plow. 557. And if Tenant for life, reversion to the King, makes a feoffment, it cannot touch the reversion in the King, nor a fee descendable passeth. But where Tenant in taylor, reversion to the King, makes a feoffment, there a base fee shall passe, determinable by the entry of the issue in taylor. But out of an Estate for life, where the reversion is not touched, no fee shall passe but onely an Estate which passeth as an Occupancy, as the difference is, Cok. Litt. 339. Tenant in taylor, reversion to the King is disseized, and a discent cast, It is good, and shall binde the issue. But Tenant for life, the reversion to the King, is disseized, No discent can be cast because a fee cannot be extracted out of an Estate for life, And 18 Ed. 3. 12. where Tenant in taylor, reversion to the

King, makes a Lease for life. He gains a new reversion, and it shall descend to his issue. And Jones cited a case Pasch. 39 Eliz. betwixt Stratford and Dove, That a discent upon Tenant in tale, reversion to the Queen, shall barr the entry of the Tenant in tale, and his issue. Secondly, Although it was said, That the privy of Estate cannot be drawn out of him; They answered, True it is, none can be Tenant in tale, but the Donor and his issue, and that Avowry shall be made upon him, and his Heir shall be in Warre. So where Tenant in Dower, or by the courtesie, alien their Estates, no estate remains in them; yet for the privy which was once in them, an Action of Waste lies against them, as Fitzh. N. B. 55. is. And quoad the Avowry, that may be; for otherwise the Donor should confesse his Reversion to be out of him, and thereby should destroy his Avowry, as Co. Lit. 269. is. And for the wardship, though the privy betwixt the King and the Tenant in tale is destroyed, the issue in tale cannot contradict it. And to the objection, That the Reversion being in the King, is not touched, & of necessity the particular Estate must remain, for the upholding of the Reversion; and that there cannot be a Reversion, but in regard of a particular Estate remaining: It was thereto answered, That a common recovery, before the Statute of 34 H. 8. had barred an Estate tale, where the Reversion in the King was not touched: And the Recoveror should have a Fee during the time, that the Tenant in tale had issue, as 28 H. 8. Dy. 31. & 15 Ed. 4. 9. Lord of a Villaine tenant in tale enters, that shall not touch the Reversion, and Cok. lib. 2. fol. 15. in Wisemans case, Where Tenant in tale of the gift of a common person, remainder to the King at this day, suffers a common Recovery: It shall barr the Estate tale, but not the remainder; and Plowd. Comm. fol. 557. Tenant in tale of a common person is attainted of treason, the King shall have a fee, yet the Fee of the Donor is not touched. Thirdly, They all argued, that against his feoffment no right remained in him, nec jus in re, nec jus ad rem: For the Feoffment gave away all his right, interest, and possibilities, as 9 H. 7. 1. 39 H. 6. 43. 12 Ed. 4. 32. 1 Ed. 4. 81. 19 H. 7. & Plow. 374. Tenant in tale makes a Feoffment, there remains no right in him, And if afterward a fine be levied by the Conusee, the issue in tale is the first who hath right to impeach it. To the fourth, That the Writ and Declaration in a Formedon, do suppose quod jus descendit, It was answered, That it was but form and not in rei veritate; and he doth not say simpliciter descendit jus, But descendit per formam Doni; and it is not properly said, descendit jus, but devenit jus, as Plowd. 374. by Southcote, Weston and Dyer, And it is but form, As in Waste, supposing that he held ad terminum annorum where he held but for half a year, And 40 Ed. 3. 5. & 38 H. 6. 3. in consimilicasu, supposing that he aliened in Fee, it is good, though he aliened but for life. So in the case of Holland and Lee, where a fine was levied, and by it the Estate Tale barred, in Error to reverse this, it is supposed quod remansit jus, or quod

quod descendit jus, as the case requires. To the fifth, That it is for the greater benefit to the Crown, and the greater discouragement of Traytors, &c. It was answered, That the right was to be respected; and it is not to be presumed, that they would commit treason, or had an intent thereto; For such foreign intendments, are not to be presumed, as 30 H. 6. Grant 41. Grant of Land after it shall Escheat, is void, because it is not intendable. And as to the cases pretended to be adjudged, It was answered, That Wallinghams case was impeached by a Writ of Error, and was affirmed for default in the pleading; and being demanded, If it were for matter of Law? it was not answered: And if it had been for the matter in Law, they would have been ready for the Queens advantage to have had it so published. Also within two years after (viz. in 18 Eliz. in the Common Bench in Moultons case) it was argued openly by all the four Justices, who by intendment had notice of the former Judgement, and they all argued, That the Estate Tayle was not forfeited, by reason of this Feoffment which saved it, and this Judgement was never impeached by a Writ of Error, yet it is very likely, if the Justices of the Kings Bench had concurred with the Barons, for the matter in Law, The said last Judgement would have been impeached by a Writ of Error. And as to the Judgement in Sheffields case, It was alledged to be very well known that some of the Judges, who died before their opinions delivered, were against the said Judgement, as appeared by their arguments, and that the Judgement in that Case, was obtained by one voice onely; And although that Judgement should be allowed to be good, yet it much differs from this case: For here the Tenant in tayle hath neither Freehold Possession, nor Right. But after this Term, because the greater opinion was for the plaintiff, it was prayed in the Kings Bench, to have Judgement for the Plaintiff. But there it was moved in stay of Judgement, That the barre to the Quowry was not good; First, Because it doth not shew, That after the Attainder of Sir Tho. Wyat, there was any seisin for the Queen: And Sir Francis Wyat had good title untill seisin. Secondly, Because it is pleaded, that the Endowment and proceedings were before the Commissioners, sub magno Sigillo. And for these causes the Court would advise. Residium postea 460.



Termino Hillarii, anno undecimo Caroli Regis,
in Banco Regis.

1. **M**emorandum, That in this vacation, after *Mich.* Term, Sir *Francis Ashley* (the Kings Serjeant) who died the day before the end of the Term, in *Serjeants Inne*, *Robert Mason* of *Lincolns Inne* Esquire (Recorder of *London*) who died in *Lincolns Inne* 21 December; And Sir *Walter Pie* of the *Middle Temple* Knight (Attorney of the Court of Wards) who died 25 of *December*, were carried down and buried in their several Countries, accompanied with two Heralds in their Coats of Armes, with divers Coaches of Nobles and others, who accompanied their Bodies, untill beyond *Charing-Crosse*. And *Henry Calthorp* of the *Middle Temple* *London*, was made Recorder of *London*, and so continued three weeks, and afterwards he was Knighted and removed, and made Attorney of the Court of Wards, the first day of this Term; And *Thomas Gardener* of the *Inner Temple* Esquire, was elected Recorder of *London*.

Spooner *versus* Day and Mason. *Mich.* 6 Car. rot. 183.

2. **E**rror of a Judgement in the Common Bench, in an Action upon the Case. Whereas Robert Futter was seized in Fee of the Manor of Thompson, and he and his ancestors, &c. time whereof, &c. had a fold-course for his and their Sheep not exceeding 300 in 70 acres, of Land in Thompson, every year from 14 dayes after the Corn was carried away, to continue untill our Lady, within the Lands not sown again: And shews that he let by Deed to the Plaintiff 75 acres, parcell of the Manor, with the Fold-course, for five years, and that the Defendants inclosed, and thereby had disturbed him of his Fold-course. One of the Defendants pleaded Not guilty, The other pleaded in Barre, That there is a custome within the said Mill, that any one may inclose any part of his Lands lying in the Common fields, and therefore he inclosed this Land, lying in the Common field, And it was hereupon demurred: And without any difficulty, adjudged that the Barre was not good, Because he doth not traverse the prescription in the Declaration: And he cannot plead a prescription against a prescription. But he ought to answer the prescription alledged in the Count: And in the Common Bench an exception was taken to the Declaration, that it was not good, Because a Fold-course being appurtenant to a Manor, cannot be divided and annexed to parcell thereof: And therefore that the Plaintiff had not any title. But the exception was there overruled and adjudged for the Plaintiff: And this point was now assigned

assigned here for Error; and after divers arguments, the Court this Term adjudged it to be good enough: For being but in nature of a Common certain, it may be well divided or annex to parcel of the Manor; and there cannot be any prejudice to the Tenants; for they shall not be charged with more than they were before; Wherefore the Judgement was affirmed. Vide 5 H. 7. 7. 1 H. 7. 24. 1 Ed. 3. 1. 27 H. 8. 10. 11 H. 6. 22.

Richard Hayes *versus* Robert Hayes. Hill, 10 Car. rot. 1045.

DEbt. Upon an Obligation of 1000 l. conditioned for the performance of the Arbitrament of Henry Clerk and Robert Sharp, of the Middle Temple Esquires, of all controversies and demands, betwixt the said Richard and Robert. The Defendant pleaded quod nullum fecerunt arbitrium: The Plaintiff shewes, That Robert Hayes, Father of the Plaintiff and Defendant, was seized in fee of divers Lands in Kent, and had Issue the Plaintiff and Defendant, and William; and devised divers Lands to the said Robert and William; and that there were controversies betwixt the Plaintiff and the said Robert and William concerning the said Land, for which the Plaintiff entered into bond unto the said Robert and William, to perform the award of the said Arbitrators; And that Robert at that time entered into one Bond by himself, And William, at the same time into another Bond, to perform the said Award; And shewes their Arbitrament, That Richard should release to the said Robert and William, &c. and that Robert and William should pay to the said Richard 300 l. at such a time and place; And for non payment of the said 300 l. the breach was assigned: whereupon the Defendant demurred. And Farrer argued for the Defendant, That this Arbitrament is void; For the Defendants Bond is for a reference of all Controversies betwixt Richard and Robert, and William is not mentioned in the Bond: And the Award is betwixt Richard, Robert, and William; and that William and Robert should pay such a sum; and the breach is alledged therein; And for any thing that appears in the Bond and Condition, William is a Stranger to the submission, unless by this collaterall surmise, which surmise is not allowable: Also this surmise is quasi a departure from the Declaration: But after divers arguments at the Barre, the Court resolved, for as much as this is not a bare surmise, but grounded upon a Deed, which is of as high a nature as the other, and made at the same time; it is quasi but one submission by severall Bonds, and so the surmise is allowable, and stands well with the Bond in question. And although the two Brothers did not joyn in one Bond of submission, because they would not be bound one for the other; Yet when at the same time they enter into severall Bonds to perform the Award, it is but as one submission, and is not any departure from the Declaration; For it is not fitting that the Declaration (which is but for the

III

debt

debt upon the bond of Rob. should mention any such submission; but it sufficeth to shew it by the replication; to maintain this Arbitrament; and therefore all the Court resolved, That the replication was good enough; to maintain the Arbitrament, notwithstanding this objection. The second objection was, that this Arbitrament was not good, because the submission was onely for Land, whereof the father was seized at the day of his death, and devised, or mentioned to be devised to the said William and Robert, or to the use of them. And the Arbitrament is, That he shall make a release of his right in the Lands conveyed or devised, and there is no authority to meddle with the Land conveyed. Sed non allocatur; For it shall not be intended that there were any Lands conveyed, to make the Arbitrament void, unless it had been shewn: And the breach is assigned for the non payment of the 300 l. awarded; Wherefore rule was given, That Judgement should be entred for the Plaintiff.

Bradstock versus Henry Scovell and others.

Trin. 11 Car. rot. 1097.

4.

Error of a Judgment in the Com. Bench in an Ejectione firmæ, of a Messuage and Land in Wickhampton, of a Lease by Tho. Baston to the said Henry Scovell; Where, upon Not guilty pleaded, and a special Verdict found, the Case was; Thomas Baston seized in fee of those Tenements, conveys them to the use of Thomas Baston his sonne, and Edith his Wife, and the Heirs of their bodies, for a Joynture for his Wife: Tho. the Sonne and Edith enters; and, being seized in tayl, have Issue Philip their eldest Sonne, and Thomas the Lessor, their second Sonne, Thomas their Father dies, Edith takes to her second husband Thomas Bulford, They by Indenture for 6 l. alien, bargain, sell, and grant to the said Philip and his Heirs, all their Right, Title and Interest which they have in the said Tenement, no Libery nor Inrollment being found. Then the said Philip Baston, by Indenture for 80 l. bargained, sold, and confirmed those Tenements to one Henry Bradstock, and levies a Fine with Proclamation, to the said Henry Bradstock, to the use of him and his Heirs: And afterward Philip dies without Issue, then Edith dies; After the said Thomas Baston the second Sonne enters and makes this Lease; and the Defendants ousts him; Et si super, &c. The sole question was, Whether this Fine by Philip the eldest Sonne, in the life of his Mother, Tenant in tayl, and he dying without Issue in the life of his Mother, shall barre Thomas the second Sonne, or not? And after argument at the Barre and Bench in the Court of Common Pleas by the opinion of Heath Chief Justice, Horton and Vernon, it was adjudged for the Plaintiff, That this Fine should not be a Barre to Thomas; (but Crawley to the contrary.) And now Error being brought, was assigned in point in Law: And after severall Arguments at the Barre, all the four Justices agreed, That the Judgement

Judgement should be affirmed : For this Fine levied by the eldest Son, who was never seized by force of the Intayle, and dying without Issue, before the Intayle descended upon him, Is not a Fine within the Statutes of 31 H. 8. nor of 4 H. 7. to barre the Intayle; For although he be inheritable to the Tayle, and if he had survived, his Fine had been a barre to his Brother, yet forasmuch as he died in the life of his ancestor, and never had the Estate Tayle, The younger brother shall never mention him in a Formedon in the descender, he never being Ancestor in Tayle to his younger brother, nor any such Ancestor, to whom the land was intayled; and therefore it is not like unto Archers Case, Co. 1. fol. 65. Where the Father disseises the Grand-father, or is infeoffed by the Grand-father, and levies a Fine with Proclamations, and dies in the life of the Grand-father, and afterwards the Grand-father dyes, his Sonne shall be barred: For he ought to claim by him, and he is one to whose Ancestors the land was intayled. And it was compared by Berkeley to the case where the father is attainted of felony in the life of the grand-father and hath issue a sonne, and dies, after ward the grand-father dies, The land shall Escheat: for the sonne ought to make his descent by him, which cannot be. But if the eldest sonne had been attainted in the life of the father, and had died without issue in the life of his father, his second brother should not have been barred. But if the eldest son had survived the father, and died after without issue, his younger brother should never have inherited. And for this point Jones said, That when he was a Judge in the Common Bench, It was so adjudged in the case of Mackwilliams, and so also in this Court, in the case betwixt Croker and Kelsey, and afterward affirmed in a Writ of Error. And although Littleton saith, That if the middle brother makes a warranty and dies without issue, his warranty is lineal to his younger brother, for that by possibility the younger brother might have inherited, so as he is, quodammodo, said to be his Ancestor, yet that is only but a possibility, and by reason of the Maxim, but it is not to be construed so here in the Case of a Fine: For it ought to be levied by him who had the Estate-tayle once in him, or to whose Ancestor the Land was intailed, and by whom the conveyance by descent ought to be made. But where he needs not to be mentioned in the conveyance by descent, there his Fine shall never barre. And Grants Case was cited; where Lands were devised to one, when he came to the age of twenty five years, in tayle, and he, before the age of twenty five years, levies a Fine with Proclamation, and after attained the said age, and had Issue and died, this Fine shall barre the Issue. For although he was not Tenant in tayl at the time of the Fine levied, yet having attained the age of twenty five years, he was the person to whom the Land was intailed; so he is within the words and intent of the Statute, That this Fine shall barre his Issue which claim under that intayl, wherefore here in the principal case,

all the Justices agreed, That the Judgement was well given,
Wherefore the Judgement was affirmed.

Salter versus Browne, Hill. 10 Car. rot. 207.

5. **E**Rror of a Judgement in the Common Bench, in an Action for words. Whereas one Jane Jennings was delivered of a Bastard childe, That the Defendant, having communication with one J. S. of the Plaintiff, and of the said Bastard childe, said of the Plaintiff these words, He (innuendo the Plaintiff) is the reputed father of that Bastard childe, (innuendo the said Bastard childe.) Judgement after Verdict was given for the Plaintiff, and Error thereof brought and assigned, That these words be not actionable. And of that opinion was all the Court (absente Brampton) unless he had alledged some temporal losse (viz.) that he lost thereby his marriage; Or that he, by this means, should be chargeable for the maintenance of such bastard child, and to have further punishment: For it was said that it had been resolved, That a bastard childe of persons able to keep it, and not like to be chargeable to the Parish, is not within the Statute of 18 Eliz. And a reputed father is to be adjudged by the two next Justices of the Peace, or the Sessions: Wherefore, for this cause, the Judgement was reversed, Hill. 10 Car. rot. 752. such a Case and such Judgement.

Clothworthy versus Clothworthy.

6. **E**Rror of a Judgement in a Writ of Annuity, Where the Plaintiff declares against the Defendant, as Heir to his Ancestor, who granted an Annuity unto him of 20 l. per annum, payable at four Feasts, viz. at Christmas, the Annuntiation, the nativty of Saint John Baptist, and Saint Michael, and for 30 l. arrear at Mich. 3 Car. before the Writ brought, which was the sixteenth of April 4 Car. &c. The Defendant pleads, Non est factum Patris sui, and found against him, and Judgement given, that he should recover the annuity and arrearages before the Writ, and what incurred pendente brevi, which amounted to seventy pounds and the damages and costs. Et quod habeat executionem of all the Tenements descended unto him, from the Grantor of the Annuity: And error being brought, it was assigned by Maynard, because the Plaintiff demands this Annuity and the arrearages thereof unto Mich. 3 Car. And his Writ is brought 16 Apr. 4 Caroli; so as there be two quarters of that annuity not demanded, which by intentment are paid: And if they be not paid, he ought to have demanded them. For if one brings Debt for part of a Debt, due upon a Contract or upon an Obligation, and doth not acknowledge satisfaction of the residue, the Action is not well commenced; Also, whether it be due or not due, the Judgement is erroneous: For the Judgement is, That he shall recover the arrearages due before the Writ (which

(which includes these two quarters rents which are not demanded) and the arrearages accrued pence brevi, amounting in toto to 70 l. so as it includes the arrearages before, and hanging the writ. But Rolls answered thereto, That this peradventure was but the misprision of the Clerk, in casting up the summe, and then it is no error, but amendable. But the Court answered, and so resolved, That it was no misprision in the casting up, but a misprision in the Judgement: Wherefore they all held, That it was erroneous. The second Error, Because the heir pleading a false plea, which is found against him, The execution ought to be awarded of his proper Lands, and of his Lands descended. But the Court held, That the denying the Deed to be his fathers, was not a false Plea in his cognisance. And although it should be false, yet being charged in respect of his Ancestors Deed, The Land of his Ancestors shall only be taken in execution; for that is the cause of his charge: And if the Land of the heir, which is his own proper Land, should be lyable as well as the Land of his Ancestor, yet it is not assignable for Error, because it is in ease and advantage of the heir. But for the first cause rule was given, That the Judgement should be reversed, unless, &c.

Tregmiell and his Wife *versus* Reeve.

Action upon the Case, and declares, That Sir John Reeve was seized in fee of a Fearm and of an hundred acres of Land thereto appertaining; And, by Indenture, covenanted to stand seized to the use of himself and wife for their lives, for a Joynture for his said wife; and after to his sonne and heir; excepting the timber trees, saving that his said wife shall have and take the shrolds and loppings of them: And that the said Sir John Reeve died, and she survived, and took to husband the Plaintiff: And that the Defendant, as heir to Sir John Reeve, cut down five Oakes growing upon the said hundred acres, whereby the Plaintiff lost all the benefit which he might have had of the shrolds and loppings of the said trees. The Defendant pleads Not guilty, and Verdict being given against him, Hide took divers exceptions in arrest of Judgement, First, That the excepting the trees after the limitation of the use is void; and then, they remaining parcell of the Freehold, he might have had trespassse; but he could not have this Action upon the Case: For as an exception after the Estate limited is void; so after an use settled, an exception cannot be of the trees. Sed non allocatur; For an exception may well be to shew his intent, That they should not be annexed to the estate for life. Secondly, That the Declaration is not good, Because he doth not shew, That he had not left sufficient Trees to have the loppings; as in the case of Estovers, The owner of the wood may cut down the wood, leaving sufficient for Estovers. Sed non allocatur; For here all the loppings of all the trees are reserved to the wife, all which she may cut down and

sell at her pleasure; So it is a wrong unto her to cut down any. Thirdly, Because it is supposed, that the Defendant cut down five Oaks growing upon an 100 acres of Land, which is not possible y five Oaks should grow upon an 100 acres. Sed non allocatur; For it is to be intended, that they grew upon some part of the Fearn. Fourthly, Because the Action is brought by the Baron and Feme, where the Baron alone should have brought the Action; for he onely might have released the damages; and the wrong is to his possession. Sed non allocatur; For the Baron, having the Land in right of his wife, he may well joyn her with him in suing for the damages; and she shall have the damages, and the action also, if she survive her husband; wherefore Judgement was given for the Plaintiff.

Tolson *versus* Clerk. Trin. 11 Car. rot. 687.

8. **E**rror of a Judgement in the Common Bench, in Assumpsit. The Plaintiff declares, Whereas the Defendant was indebted unto him in such a summe, That in consideration the Plaintiff would aliquo tempore forbear him, he promised to pay, &c. and alledges, That he forebore for a year and more; And that the Defendant hath not yet paid, &c. After Verdict, upon Non assumpsit, and Judgement for the Plaintiff, it was assigned for Error by Grimston (and so held to be Error) That aliquo tempore is so short a time, that it is no consideration no more than per paululum tempus: wherefore for this cause the Judgement was reversed.

Bumpsteds Case.

9. **B**umpsted was indicted for extortion by two severall Endictments. In the one, That he, as Bayliff of the Sheriff of Wilshire, had received twenty shillings from one extorsive colore officii sui: And in the other, That he extorsive, took six shillings eight pence. These being preferred against him, before the Justices of the Peace at Michaelmas Sessions last, in the County of Wils, and he thereupon committed to Prison, was enforced (as he pretended) to plead presently to those Endictments. And the same day they were tryed, and he convicted, and Judgement against him at one and the same Sessions, that he should be imprisoned and fined fourty pounds for the one offence; and for the other twenty pounds; and upon every of them treble damages given, viz. for the one three pound, and for the other twenty six shillings eight pence (which was more by six shillings eight pence than he had received) and to be committed to Prison untill he had paid those fines and damages. And now upon these Judgements he brought severall Writs of Error; and by Grimston it was assigned for Error, First, Because the Endictment and the Tryall were at one and the same Sessions, whereas they ought not to be tryed and traversed the same Sessions. Secondly, Because they gave damages to the party,

party, where they ought not to have given any damages. Vid. 4H. 5. Enquest 55. & 22 Ed. 4. Coron. 44. That Justices of Gaole-delivery may take enquest the same day; But not so of Justices of Peace, Stanford 155. Postea pag. 448.

The King against the Inhabitants of Epworth, and fifteen other Villis.
Mich. 11 Car. rot. 146.

The King by a Writ out of the Chancery, dated 16 Junii, 11 Caroli, commanded the Sheriff of Lincoln, That he per Sacramentum proborum & legalium hominum Comitatus prædicti diligenter inquirat, qui Malefactores & pacis Regis perturbatores, apud Epworth, Belton, & Hacksey infra Manerium Regis de Epworth Sepes, Fossata, & Fensuras ibidem nuper levata noctanter prostravissent: Et ponet per vados, et salvos plegios, quos culpabiles invenerit, ad respondendum in Banco Regis de et super præmissis in Octabis Michaelis ensuant; Et quod haberet ibi nomina eorum per quorum Sacramentum, Inquisitionem illam fecerit, et breve illud. And hereupon the Sheriff returned an Enquisition taken 3 Octob. 11 Car. apud Lincoln; whereby it is found, Quod quidam Malefactores et pacis Regis perturbatores primo Maii 10 Car. et diversis diebus et vicibus, inter the said first day of May 10 Car. et primo Junii 11 Car. apud Epworth, Belton, et Hacksey prædicta, infra Manerium Regis de Epworth prædict. vi et armis et cum multitudine gentium ignotorum, 700 perticatas fossatorum fensurarum Regis apud Epworth, Belton, et Hacksey prædicta, nuper levat. in noctibus dictorum dierum prostraverunt, ad grave damnum dicti Domini Regis. Sed qui illa fossata et fensuras, vel aliquam partem eorundem sic prostraverunt, Juratores prædicti poenitus ignorant. Et similiter dicunt, Quod Malefactores prædicti qui malefacta prædicta taliter ut supradictum est fecerunt, cum tali vi et multitudine gentium, et in nocturnis temporibus prædictis commisserunt et perpetraverunt, Ita quod nullus ad eos appropinquare ad ipsos cognoscendos ausus fuit. And upon this return a Writ of Distringas issued out of the Kings Bench, Test. 9 Octob. 11 Car. reciting the said Writ, Return, and Enquisition, commanding the Sheriff to distrain propinquas villatas fossata et fensuras prædicta circumadjacentes fossata et fensuras prædicta prostrat levare, ad cultus suos proprios; and commanding him to enquire per Sacramentum proborum, &c. Quod damnum Rex sustinuit occasione prostrationis prædictarum 700 perticarum fossatorum et fensurarum, et damna illa nobis restituas. And this was returnable crastino Martini following; and hereupon the Sheriff returned, Quod Villata de Epworth, and fifteen other Villages there named, are the nærest Villages circumadjacent to the foresaid pitches and fences; Et quod Rex sustinuit damna occasione in brevi prædicto specificat. ad 2500 li. Et quod propter brevitatem temporis, non potuit levare damna prædicta de terris et tenementis illis, ita quod dicto Domino Regi restituit; And returned issues upon the Inhabitants of every Village

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ad levationem fossatorum & sensurarum prædictæ, ad 20 l. And after, ward another Writ of Distringas, 28. Nov. 11 Car. issued, reciting the first Writ and the return thereupon; And the Writ of Distringas, and the return thereupon; And that the King is informed, that the said fossata & sensuræ nondum levata existunt, and therefore commanded the said Sheriff to distrain the said Villages of Epworth, &c. per omnia terras & catalla sua, &c. Ita quod ipsi ad custus suos proprios fossata & sensuras prædicta prostrata levant. Ac nobis prædict. 2500 li. pro damnis prædictis, quæ nos sustinimus occasione prostrationis prædictæ. 700. perticarum, fossatorum, & sensurarum, restituant. And upon this, Rolls moved, That the first Writ was not well granted; For it appears by the Writ and Enquisition, That the prostration began the first day of May 10 Car. and continued till the first of June 11 Car. so as it was a short time, (viz. but five daies) before the Writ brought, which ought not to be, but there ought to be so long distance as the Country may have a convenient time to enquire, which ought to be a year; and so it was held in 12 Jac. Secondly, It doth not appear that this prostration was of any fences, &c. of the Common, which was improved; For the Statute doth not extend to all Inclosures, but to the throwing down of fences upon improvements of Commons. Thirdly, That the Writ doth not make any mention, That the Malefactors were not indicted. But Sir John Banks the Kings Atturney answered to the first, That he had seen the resolution in 12 Jac. and it was not, That there should be a year to indict the offenders, but there ought to be a convenient time, and that the Court shall adjudge whether the time were convenient. To the second, That the Statute doth not only extend to the prostration of Inclosures, to be improved out of the Common, but to all Inclosures, and it is for the benefit and Peace of the Commonwealth, and shall be expounded most favourably for the King and benefit of the Commonwealth: And if it extends only to improvement of Commons, it ought to have been pleaded, that this Inclosure was not any parcel of the Common improved. To the third, That the Defendants should have pleaded, if any of the offenders had been indicted. Et adjournatur. Vide the Statute of West. 2. cap. 46. upon which this Writ is grounded.

Hilton *versus* Bembridge. Trin. 11 Car. 100.

11. **T**Respasse, Quare clausum fregit, Upon Not guilty a speciall Verdict found, the Case was, That George Bembridge was Tenant for life, Remainder to Anthony Bembridge in tale; Anthony, by his Deed, granted the Remainder to the Plaintiff in fee; The said George Bembridge being Tenant for life, having notice of this Grant, said unto T. H. and J. S. two Strangers, That he was well pleased and content that the said Grant was made to the Plaintiff, for he was his Cousin. And that the said George Bembridge was dead, and Anthony Bembridge is yet alive: And if this were a good Atturment

toznment, they find for the Plaintiff; if not for the Defendant. After argument at the Barre by Widderington for the Plaintiff, and Bulstrode for the Defendant, upon the first argument, all the Court agreed, That it was an Attornment, although the words were spoken to those who were meer Strangers, and who peradventure had not any notice of the Grant, nor were sent or required by the Grantee to take Attornment, nor required the Tenant to assent, but was a voluntary speech only; for it sufficeth, that the Tenant hath notice of the Grant, and assents thereto. See Bracton fol. 81. And it is for the benefit of the Grantee, who having the Grant, and accepting of that assent, shall be intended to agree thereto, in the life of the Tenant for life; because, being a lawfull Act, the Law accounts, that he agreed to that Attornment: And it is not necessary to Attourn to the Grantee himself; for all the pleading is, *A quel grant soy attornera*, without mentioning the Attornment to be to the Grantee or any other. And if the Tenant indorse his hand as a witness to the Deed of grant of the Reversion, it is a good Attornment, unless he doth not know what was in the Deed, for he ought to have perfect cognisance of the Grant; otherwise it is not a good Attornment. Whereupon, without any further argument, the Attornment was held to be good, and adjudged for the Plaintiff. Vide Cok. Litt. 310. & Cok. lib. 2. fol. 69. That assent to a Stranger sufficeth. And the Case of 28 H. 5. Attornment 4^o. That Attornment to a servant was not good, was denyed here to be Law.

Stockman *versus* Hampton, Trin. 11 Car. rot. 752.

T Respasse, Quare clausum fregit, and chasing his Cattel. The Defendant justifies, For that Sir Bartholmew Michaell was seized in fee, and died seized, which descended to his two daughters and heirs; And he by their command, &c. The Plaintiff replies, That true it is, Sir Bartholmew Michaell was seized in fee: But he saith, That being so seized, he, in consideration of the love and affection to Richard Michaell his Nephew, and others of his blood, by Indenture 25. Martii, 15 Jac. covenanted with Edward Rogers and others, to stand seized of those Lands, to the use of himself and the heirs males of his body; and for default of such Issue, To the use of the said Richard Michaell for life, Remainder to his first son in tail, with divers Remainders over in tail, Remainder to the right heirs of the said Sir Bartholmew Michaell, whereby, and by virtue of the Statute of Alex, the said Sir Bartholmew Michaell was seized in tail, with the Remainders over, and dyed seized of such an Estate, without Issue Male, whereupon the said Richard entred, and the Plaintiff by his licence put in his Cattel, &c. and traverseth, That the said Sir Barch. Michaell dyed seized in fee. Upon this the Defendant demurs, and the principall cause was,

Because

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Because the Plaintiff claiming by this Deed of uses, which cannot commence without Deed, both not shew the same. And this being argued divers times at the Barre, All the Court held, That the Plea was good without shewing the Deed, first, Because the Deed doth not belong unto him, although he claims thereby, but to the Covenantees, and he hath not any means to obtain the Deed; and it should be mischievous to those who claim under such a Deed, if they should lose their Estates unless they might produce it. Secondly, Because it is an Estate executed by the Statute of Uses: so the party is in, by the Law, as Tenant in Dower, and Tenant by Statute Staple, or Merchant, which have a rent charge extended by them, as 31 E. 3. *Monstrans de fayis*, 38 & 35 H. 6. *ibid.* 118. Thirdly, and principally in this Case, Because it is but an inducement to the Traversers: And is not answerable by the Defendant; but he ought to maintain his barr, That he dyed seized in fee. Vide 27 H. 8. 2. 21 Ed. 4. 8. Plow. Comment. 64. Whereupon all the Court agreed, That the Replication was good, without shewing the Deed: Wherefore it was adjudged for the Plaintiff. Vid. 14 H. 8. 9. per Pollard, 20 H. 7. 8. per Fineux, Cok. lib. 10. fol. 92. Doct. Leifeilds Case, Coke Lit. 226. 28 H. 8. fol. 29.

Slocombs Case.

13.

ERror of a Judgement in Bathe, in an Action for words. Where the Judgement, after the Verdict for the Plaintiff, was given for the Defendant, intending that the Action did not lye for the words. And the entry is, Ideo concessum est. Quod querens nihil capiat per billam, which was held a manifest error; for it should have been Ideo consideratum est. Then Germyn for the Plaintiff in the writ of Error moved, That Judgement should be given for him upon the Verdict; And that the Declaration is good. And it was agreed by all the Court, If the Declaration and Verdict be good, then Judgement ought to be given for the Plaintiff: Whereof Jones doubted at the first, but at last agreed thereto; for we are to give such Judgement as they ought to have given there; so as the Plaintiff shall recover, if the Declaration be good. And Hyde now moved, That the Judgement in the inferiour Court was good for the matter, and that the Declaration was ill: For he there declared: Whereas such a suit was depending in the Court of the Guildhall in Excester, shewing what, Et quod superinde exitus per patriam fuit junctus; and at the tryall the Plaintiff was produced as a witness there, to prove the Issue, and was sworn and gave his evidence upon his Oath. That the Defendant having communication with one Marjery Slocomb, of this Tryall and Oath by the Plaintiff, swake these false and scandalous words of the Plaintiff, to the said Margery, Thy Brother (innuendo the Plaintiff, brother of the said Margery) hath taken a false Oath in such a cause (innuendo the said Cause.) The Defendant pleaded Not guilty, and found for the Plaintiff,

Plaintiff, and damages and costs assessed. The Court upon the matter adjudged, That the Declaration was not good. Hide assigned the cause to be, Because he doth not shew how issue was joyned; For he saith *Ad exitum per patriam*: And though by implication it is to be intended, that issue was well joyned; yet it is not so alledged: and then no lawfull Tryall, whereto he might be produced as a witness. Sed non allocatur; For when it is shewn, That at the Tryall he was sworn, it implies all necessary circumstances, That the issue was joyned and the Jury sworn, and that to the said Jury, upon this issue, he gave his evidence. The second exception to the Declaration, Because in the communication alledged with Margery Slocomb, of this Oath at the Tryall, he saith, Thy Brother (innuendo the Plaintiff, brother to the said Margery) hath made a false Oath, &c. And in all the Declaration it is not averred expressly, that he was his sister, nor that he was her brother, but after the innuendo; nor is it averred, that he was the sole brother of the said Margery. And that which comes under or after the innuendo, is not an express averment, nor issuable: wherefore the Declaration is not good. And of this opinion was all the Court (absente Brampton:) Wherefore it was ordered, that a speciall entry should be made, That the first Judgement should be reversed for the manner of the entry *Ideo concessum*. But because it appeared to the Court, that the Declaration was insufficient, it was adjudged here *Quod querens nil capiat per billam*.

Corbett *versus* Barnes.

Aldita Querela by three, to avoid a Judgement in this Court against the said three in Trespasse: Where one of them was only taken in Execution upon this Judgement, the others not being touched: And therefore Maynard took exception to the Writ and Declaration, Because, he who was in Execution ought only to have had the Audita Querela, and the others, who never yet were grieved, ought not to joyn with him: And to prove this, he relied upon 35 H. 6. 1. Fitzh. N. B. 104. 17 E. 3. 27. Sed non allocatur; For they being parties to the Judgement, and liable to the Execution, although it was never had against them, yet for their indemnity may well have an Audita Querela, and joyn with him who is in Execution. Secondly, He excepted against the surmise in the Audita Querela, That it was not good; which was, Whereas one J. S. was sued in the Common Bench for a Battery, supposed to be done in London, and by Verdict the Plaintiff had Judgement for 30 l. damages and costs; and the said J. S. was taken in execution for these damages and costs: And afterwards he and the two other Defendants were sued in this Court for this Battery, supposed to be done in the County of Hereford, and they three were by Verdict and Judgement condemned in this Court; and it appeared that this Action and the Action in the Common Bench were for one and the

kkk 2;

same

same Battery, and not divers; And that the then Plaintiff had acknowledged satisfaction of the said Judgement to J. S. in the Common Bench, and yet notwithstanding, against Law, had sued to have execution of the said Judgement, where he was satisfied for the same Trespass; And hereupon the Defendant demurred; and now Maynard, for the Defendant in the Audita querela, moved, That this cannot be surmised, because the one Recovery being in London, and the other in the County of Hereford, it cannot be intended to be one and the same Battery. Sed non allocatur; For the Action being transitory, may be layed in what County the Plaintiff will: And it being abridged by the Record, to be one and the same Trespass, and not divers, &c. and this being confessed by the Demurrer, the Plaintiffs are not such Strangers to the Record, but that they may have benefit of the satisfaction by the said Record; and because they are all parties to the Act, the Law gives liberty unto every one of them, to take advantage of any one of their Acts for the others discharge; As if a release were to one of the Trespassors, and the other had it to plead, they should take advantage thereof, to discharge themselves accordingly; Wherefore it was held, That the surmise was good, and adjudged for the Plaintiffs, unless, &c.

Gryffyth and his Wife *versus* Lewis and his Wife.
Mich. 10 Car. rot. 397.

15. **E**rror, of a Judgement in the grand Session in the County of Pembroke, where the Plaintiffs had brought a Quod eis de forciant, and made their protestations prosequi breve illud in forma & natura brevis de quod eis deforciant ad communem legem, secundum formam Statuti de Rutland, & petunt Messuagium & Terras in R. quæ clamant tenere sibi & hæredibus de corpore ipsius *Maria*, ut in jure ipsius, et undedicunt quod quidam *Thom. Bennet* fuit seifitus in feodo, and gave those Tenements after the Statute of 27 Hen. 8. of Uses, viz. 42 Eliz. to Feoffees, to the use of the said Mary and the heirs of her body, by virtue whereof they entred, and took the Esplees within twenty years last past. Upon this Writ and Count, the Tenants demanded Judgement of the Writ, because they say the said Writ is a Writ formed by the Statute of Westm. 2 Edit. 13 Ed. 1. by which Statute it is provided, Quod quicunque tale Breve intulerit, debet in brevi suo mentionem facere de Statut. quem clamat habere in Tenementis petitis, &c. And in this Writ there is not any such mention, Et hoc, &c. whereupon they demand Judgement of the Writ, &c. and the Demandants thereupon demurred; and it was adjudged there, That the Writ should abate. And now this matter was assigned for Error, and was divers times argued at the Barre, and this Term by Glynn for the Plaintiff in the Writ of Error, and by Beare for the Defendant; And all the Justices, seriatim, delivered their opinions for the Plaintiff in the Writ of Error, That

That this Writ was good; for it is given by the Statute of 12 E. 1. of Rutland, called Statutum Wallie, where this Writ, as here, verbatim, is set down, and there saith, That commune breve quod in aliquo casu tangit jus, et in aliquo casu tangit possessionem: And in the end of the said Writ, it is Et similiter conceditur istud breve coram Justiciariis de Banco, si petens voluerit: And although the Statute of Westm. 2. cap. 4. gives an especiall Writ of Quod ei deforciat in speciall cases, where the Tenant for life, Tenant in dower, or Tenant in tail, and so by equity where Tenant by the Courtesie, lose their Lands by recovery by default; And in such case the Writs make mention of their Estates: Yet this being made anno 13 Ed. 1. doth not take away the Statute of Wales, made 12 Ed. 1. which gives the Quod ei deforciat; And this hath been the common practise ever since in Wales, as in 2 Ed. 4. 12. by Needham, who was Justice of Chester, appears: And although in 2 Ed. 4. 11. it is held, That a Quod ei deforciat was not at the Common Law, but was given by the Statute Westm. 2. Berkeley and my self denyed it; for there was a Writ of Quod ei deforciat at the Common Law, as appears by 33 Hen. 6. 46. and 10 Hen. 7. 9. by Frowick, and by Bracton, That this Writ was given, where one is deforced of Land; And the Book of 2 Ed. 4. is to be intended, That it was not a Quod ei deforciat at the Common Law, where a Recovery was by default against a particular Tenant; for he had not any remedy untill the Statute of Westm. 2. and it is only given by the Statute; but in other cases, upon a disseisin or matter in fact, a Quod ei deforciat lies; And the Statute of Rutland proves, That a Quod ei deforciat was at the Common Law: And although this Statute of 13 Ed. 1. comes after the Statute of 12 Ed. 1. which gives the Quod ei deforciat, That doth not take away the Statute of duodecimo Edwardi primi, but that he may have a Quod ei deforciat, and makes his protestation Prosequi, in nature of what Writ he will; As the Statute of decimo tertio Edwardi primi which give the *Formdon in descender*, doth not take away the custome of London, That they shall have a Writ patent, and shall make their protestation prosequi in natura brevis, *de Formdon in descender & droit close in auncient demeas*n, or make their protestation, prosequi, in nature of any other Writ that they will. As Fitzh. N. B. and old Book of Entries, fol. 233, & 234. appears. But Jones doubted thereof, whether this Writ lies at the Common Law. And although Beare objected, That if this Writ be warranted by the custome of Wales, it ought to be shewn in pleading, especially to reverse a Judgement. Yet non allocatur; for the Court here shall take consulaunce of their Customes and Proceedings, especially being warranted by the Statute of Rutland; wherefore it was adjudged for the Plaintiff in the Writ of Error, That the Judgement should be reversed, And that the Writ should stand, And that the Tenants shall plead thereto the next Term. So note, That for Lands in Wales there may be pleading here.

Moyser *versus* Gray, Major of Beverley. Mich. 11 Car. rot. 500.

16.

Action upon the Case. Whereas the Plaintiff distrained for 7 l. 10 s. rent, reserved upon a Lease made to J.S. And thereupon, the said John at Stile brought a Replevin directed to the said Major, commanding him to accept Pledges of John at Stile the Plaintiff in the Replevin, and to deliver the Cartell according to the Statute of Westm. 2. That the Defendant delivered the Cartell without finding Pledges. To this the Defendant pleaded, That John at Stile the Plaintiff, in the Replevin, delivered unto him 3 l. 10 s. for Pledges, which he accepted: And upon this being demurred, Rolls now for the Plaintiff moved, That it was an ill Plea; For when he is commanded, That if the Plaintiff find Pledges, then he shall deliver: He ought not to accept money in lieu of the Pledges; For the Pledges are found, to answer the party, if he hath good cause of Avowry, and to be answerable for the amercement to the King, if he be non-suited, or if he be found against him: And although he might take money for Pledges, yet he ought not to accept of less than the Plaintiff demands. And all the Court held the Plea to be vitious for both causes. For although (as Berkeley said) a Justice of Peace may take money to lie in deposito, for the security of the Peace, and the money shall be forfeited to the King, if he doth not keep the Peace. Yet here it must not be so, because the party is interessed to have the benefit of the Pledges by a Scire facias, if he recover; but he hath no remedy to have the money from the Major, being in his purse, if he should have Judgment to recover. Secondly, The Plea is ill, because it is a lesser summe than what was demanded. But if the Major had taken but one Pledge (if he had been sufficient) it had been well enough; but it is at his perill, if the Pledge be not sufficient, as it is in Cok. lib. 10. fol. 502. Denbawds Case. The Sheriff may take one Surety for appearance to an Arrest, notwithstanding the Statute 23 Hen. 6. Wherefore, without further argument, it was adjudged for the Plaintiff.

Girlings Case.

17.

False Imprisonment. For Assault, Battery, and Imprisonment for six dayes: The Defendant pleads to all, but to the Assault, Battery, and Imprisonment for six hours Not guilty; And for the Battery and Imprisonment for six hours, he justifies by virtue of a Warrant from the Sheriff of Suff. to arrest him upon a Latitat, who directed his Warrant to the Bayliff of . . . to execute it, who arrested the Plaintiff, and required the Defendant to be ayding to him, and to keep him; And therefore he detained him for six hours, untill the Sheriff discharged him, which is the same Battery and Imprisonment, &c. Upon this Plea the Plaintiff demurres,

demurs, and by Keble shews, That the Plea is ill, Because it is not pleaded, that the Writ, being executed, was returned; for the Writ is conditional, Ita quod Habeas Corpus in Court tali die, &c. And therefore if the Sheriff himself would justify, as here, &c. it is no Plea, without shewing the return of the Writ; and the Sheriffs servant shall not be in a better condition than his Master should be. Sed non allocatur; For true it is, The Sheriff ought to return his Writ, otherwise his justification is not good; but it is not so with his servant, for he hath no means to enforce the Sheriff to make return thereof: And that which he did, was legally done; and it shall not be made illegal by the Sheriffs act, in not returning the Writ. Secondly, It was objected, That this discharge by paroll was not good. Sed non allocatur; For the Sheriff may well discharge his servant by paroll, that he shall not keep his prisoner any longer; For as he may deliver the prisoner to the Sheriff, without more circumstance; so he may be discharged by his paroll, from keeping him any longer; wherefore it was adjudged for the Defendant.

Wilkinson *versus* Merryland. Trin. 10 Car. 101, 1045.

Fectione firmæ. Upon a speciall Verdict the Case was. One died seized of divers Lands in A. B. and C. in fee, the Lands in C. being in him by way of Mortgage and forfeited: He devised the Lands in A. and B. to severall persons and their heirs, and deviseth to divers persons severall Legacies, and then adds this clause, All the rest of his Goods, Chattells, Leases, Estates, Mortgages, Debts, ready Money, Plate, and other goods whereof he was possessor, he devised unto his Wife, after his Debts and Legacies paid, and made his Wife Executrix and died. The Wife entered into the Land mortgaged, and devised it to the Defendant and his heirs, and dies: And the Lessor of the Plaintiff, as heir of the Devisor, enters, and makes the Lease to the Plaintiff, and the Defendant actually ousted him. The sole question was, Whether the fee passed to the Wife by this Devise, by the name of All his Estate, Mortgages, &c. And the Court held, That no fee passed unto her: wherefore Rule was given, That judgement should be entered for the Plaintiff, unless cause was shewn to the contrary, &c. postea pag. 449.

18.

Blague *versus* Gold.

TRespasse. Upon a speciall Verdict it was found, That Peter Blague was seized in fee of two houses in Andover, the one called the corner house, in the tenure of one Binson and Nott, and of another house thereto near adjoining, in the tenure of Hitchcock, He deviseth his house called the corner House in Andover, in the tenure of Binson and Hitchcock, to J. S. in fee. Whether the house in the tenure of Hitchcock, adjoining to the corner house,

19.

house, shall pass or no, was the question? and resolved, That it shall not. But only the corner house in the occupation of Binson and Nott (if they occupie jointly) shall pass; but if they occupie severally, viz. one part in the Tenure of Binson, and the other part in the tenure of Nott, severally, then only that in the Tenure of Binson shall pass, and not the residue in the Tenure of Nott; Wherefore rule was given, unless other cause were shown to the contrary, That Judgement should be for the Plaintiff. Vide residum postea. 473.

Pumpsteeds Case, quod vide ante pag. 438.

20.

WAs now moved again by Keeling Junior; And he insisted upon for Error, That neither Justices of Peace, nor Justices of Oyer and Terminer, might enquire and take Traverses and determine Endicements the same day; But Justices in Eyre and Gaol delivery might: Because there is warning given long before, of their coming; and the Offenders may know what matters are determinable there: and there is a precept for Jurors to come out of all parts of the County, to try and determine offences before committed, whereof the Prisoners may take Cognisance: And it is for the speedy delivery of the Prisoners. And for this reason, compared to the proceedings in this Court, which is as the generall Eyre, as 27 Assis. 1. Where the proceedings be for offences committed in the County of Middlesex. This Court is as Eyre, to proceed de die in diem, and to award Venire facias returnable the next day, or at another day after, according to their appointment, without regard of fifteen dayes betwixt the Teste and Return: But if any Endicements be removed out of London, or out of the Sessions of the Peace in Middlesex, by Cerciorari, or out of any other County, where the Defendant is to plead here to the Issue, the usuall course is to award a Venire facias, and to have fifteen dayes betwixt the Teste and Return: A multo fortiori in the Sessions of the Peace, or before Justices of Oyer and Terminer. And for this point, vid. 4 Hen. 5. Enquest. 5. by Hankford, 22 Ed. 4. Coron. 44. 2 Hen. 8. 159. in Kelloway, Stanford 156. And of this opinion was all the Court, That Justices of Peace may not enquire, trie, and determine Civill offences in one and the same day; For the party ought to have a convenient time to provide for the Triall. The second Error assigned, was, That they awarded to the one, treble damages, viz. where he took 20 Shillings extorsive, they awarded to the party 3 l. and 40 l. fine to the King. And upon the other Endicement, where it was found, That he took 6x Shillings eight pence extorsive, they awarded; That he should pay to the party for damages 26 s. 8 d. (so a quadruple value) and 20 l. fine to the King, which all the Court clerly held to be erroneous: For although, by colour of the Statute of 23 Hen. 6. cap. 10. where treble damages are given to the party, they might assess them; yet it is here undue and erroneous;

nious: for they ought first to have inquired of the damages, for per-
adventure it may be more or lesse, according to the circumstances:
But they may not assess them themselves, without inquiry by the
Jury, for the Jury ought to have found the damages, and then
they might treble them. And for the other quadruple damages, it is
without colour and out of the Statute: And the Endiament is not
contra formam Statuti, as it ought to have been, if they would pro-
ceed upon the Statute. Also it is doubtful, whether this Sta-
tute extends unto extortions, unless taken upon Arrests: For the
Statute doth not speak, but of Arrests, and extortions taken upon
them. But the Court resolved not this point: But for the said
two former errors, the Judgement was reversed.

Bells Case.

BELL was indicted, That he feloniously, octavo Jacobi, stole a
Silver Ladle of Plate from King James, whereas in truth it
was the Plate of Queen Anne, and stolne from her; for which he
obtained his Pardon, by the Queens means: And now he was
indicted again, for stealing the same Plate. And whether he should
have the benefit of the generall Pardon of vicesimo primo Jacobi,
without pleading it and praying a discharge, because there is a
speciall exception in the Pardon of Goods taken away, purloyned, or
stoln from the King, was the question: Henden moved, That this
exception is to the taking away of Goods, &c. / as Trespassor,
whereby the property of the Goods is labled to the King, and doth
not except the felony. But the Court doubted hercof, whereupon
they advised him to plead, 26 H. 8. 7. 4 H. 7. 8.

21.

Wilkinson *versus* Merryland. Ante pag. 447.

The Case was now moved again by Denn, an Appzntice of
the Law; and he urged strongly, That an Estate in Fee
passed: For in as much as he had disposed divers of his Lands to
his brothers and their heirs, and divers personall Legacies to
them and to others, but of those Lands in question (being mort-
gaged to him and his heirs, and forfeited) he had not made any
disposing; he devising the residue of all his Goods, Leases,
Estates, Mortgage, &c. to his wife, All the Estate which he
had in the Mortgage (which is a Fee simple) passed thereby; for
it being in a Will, shall passe according to his intent. As De-
vise of Land in perpetuum shall passe the Fee: And the Case is
Eliz. Dy. 357. Devise of the Fee simple of his house in Soper-lane
to his wife, a Fee passed, without the word Heirs, and other
Cases to that purpose. To shew that a Fee passed by the in-
tent of the Devisor, without the word Heirs. But Jones
and my self continued our former opinion; That no

22.

fee passed. But the greater question would have been, Whether an Estate for life had passed to the wife, if she had been alive, Because it is coupled only with personall things, as Goods, Leases, Estates, Mortgages, Debts, &c. which may be intended, that he meant only but Estate for years, or Mortgages for years; and so much the rather by reason of the words, whereof I am possessed; And Berkeley (who was absent the day before) concurred in opinion; For the heir shall not be disinherited, nor the fee passed away without an apparent intent out of the words of the Will. And in this case is doth not appear, That he intended to pass, but such things whereof he was possessed, which extend only to things personall, or Leases, whereof he is possessed, and not to freehold, whereof he is said, in Law, to be seized. And peradventure he was not possessed of this Land; For it is not found, That the Mortgagee entred and was in possession: And commonly in Mortgages, the Mortgagee retains the possession untill the Mortgagee enters for a forfeiture; wherefore it was appointed, That Judgement should be entred for the Plaintiff. But they agreed, If he had devised all his Estate in such Land; or had mentioned, That he had such Land mortgaged in fee, and devised his Mortgage, the fee had passed.

Cleve versus Veer. Trin. 11 Car. rot.

23.

Ejectione firmæ of a Lease by Edward Dobbs, of Lands in Dufsborn Abbots, in the County of Gloucester. Upon Not guilty pleaded, a speciall Verdict was found, That the said Edward Dobbs was seized in fee-tail of that Land; and so seized, was bound in a Recognisance, in nature of a Statute Staple, according to the Statute of 23 Hen. 8. acknowledged before Sir Henry Hobert, chief Justice of the Common Bench in 800 l. to William Blythe, That he, the said William Blythe, 21 Jac. made Elizabeth Throgmorton his Executrix, and dyed primo Julii, primo Caroli; That the said Executrix proved the Will; and for the said 800 l. nono Julii, primo Caroli, sued out of the Chancery an Extendi facias returnable in Chancery Octabis Michaelis: That afterwards, and before the return of the Writ, viz. 17. August. primo Caroli, the said Elizabeth the Executrix dyed: And that 22. Septemb. primo Caroli, the Sheriff, virtute Brevis prædicti cepit inquisitionem, whereby was found, That the said Edward Dobbs was seized in fee-tail to him and the heirs males of his body, of the said Tenements in question, at the time of the Recognisance, of the annuall value of fourteen pounds, four shillings, ten pence, and at the day returned this inquisition into Chancery. They find, That 19. Aug. 1625. which was in primo Caroli, Administration of the Goods of William Blythe, not administered by Elizabeth Throgmorton, who dyed intestate, were committed to Robert Throgmorton, who, vicesimo secundo Maii, secundo Caroli, obtained a Liberate out of the Chancery to have the said Lands delivered unto him the said Robert

bert Throgmorton Administrator, which was returned, That, secundo Junii secundo Caroli, the Sheriff delivered the said Lands to the said Administrator, tenendum, according to the said Extent; whereby he entred and was seized, prout Lex, &c. And that the said Edward Dobbs entred and let to the Plaintiff, prout in the Declaration, whereby he entred and was possessed, untill the Defendant, as Servant to the said Robert Throgmorton, the Administrator, ousted him; And if, &c. And upon this Speciall Verdict, it was argued at the Barr by Bulstrode and Rolls, That this Extent and Liberate were void; For the Extent being sued by the Executrix, upon the Statute made to her Testator, and she dying before the Enquisition taken, The Enquisition taken after the death of her, who sued it, was void: For the Writ is to apprise and seize into the hands of the King, ut ei liberari faciamus to the said Executrix; and she being dead before the said Enquisition was taken (so as it cannot be delivered unto her) the Enquisition taken after, and returned, is void. And for this they relied upon 36 Hen. 6. Bro. tit. Statute Merchant 43. Secondly, it was objected, Admitting this Extent be not void for that cause: yet the Liberate is not well executed, to deliver it to the Administrator; For the Executrix suing it as Executrix to William Blythe the Testator, and she dying intestate, this Writ is sued by the Administrator, who comes *paramount* her, and claiming immediately from the first Intestate, cannot upon this Extent, sued by the Executrix, have the Liberate; but he ought to commence de novo, and procure a new Certificate, and a new Extent and Liberate: And compared it to 16 Hen. 8. 7. and the Case 23 Hen. 8. cited Co. lib. 1. fol. 96. in Shelleys Case, That if an Executor sues a Debtor upon an Obligation made to his Testator, and recovers, and dies intestate, the Administrator of the first man cannot have a Scire facias upon this Judgement, because he comes in *paramount* the Executor who recovered, but he ought to begin de novo. And also compared it to the Cases of a Statute Merchant; Where the Conusor procures it to be certified into the Chancery, and a Capias thereupon returnable into the Common Bench (as is usuall) or into the Kings Bench; and the Conusor is returned Non est inventus, and after, the Conusor makes his Executor, and dies before the Execution made by Extendi facias, his Executor may not have an Extendi facias, but ought to have a new Certificate out of the Chancery, and a new Capias; as it is Firzh. N. B. 131. & 2 Eliz. Dyer 180. 17 Ed. 3. 31. 25 Ed. 3. 2. Jones and Berkeley held, That for both causes the Liberate was not well executed, but void. But I held the contrary: Yet, to the first, I agreed, That if an extent be taken in the name of one who is dead, before the Teste of the Writ, it is void, according to the said Book of 36 Hen. 8. But where an Extent is sued, and the party who sues it, dies after the Teste of the Writ, and before the Enquisition taken; In that case the Sheriff ought to inquire what Lands the Conusor had at the time of the Recogni-

sance acknowledged, and to make enquiry of the value of them, and to seize into the Kings hands, and return them into Chancery: And the Sheriff is not bound to take notice of the parties death, who sued it; for he is only to execute and return his Writ: But if Execution be sued in the name of one who is dead, before the Terme, it is merely false and void: And upon this, if the party be taken, he shall have remedy by *Audita Querela*, or otherwise, as the case requires. Secondly, I held, that the Liberate was well executed at the Suit of the Administrator; for I agreed the case, That an Administrator shall not have a *Scire facias* upon a Judgement obtained by an Executor, because he comes *paramount* that Judgement, and is not *party* thereto. And that if a Testator procures a Certificate upon a Statute Merchant, and a *Capias* is returned into the Common Bench, and the Testator dies after the return, and before the *Extendi facias* awarded, the Executor must have a new Certificate and a new *Capias*, and shall not have an *Extendi facias* upon the *Capias* returned, because he is another person and in another Court. But upon a Statute Staple, or a Recognisance upon the Statute of 23 Hen. 8. in nature of a Statute Staple, a Certificate being made, and delivered into the hands of the Clerk of the Crown in Chancery, in that case by a Warrant from the Lord Keeper, he shall have an *Extendi facias* thereupon: For this being executed and returned, is delivered into the Petty bagge; And although he who procured it be dead, yet being all in one Court, and appearing on Record, it is not the course to have a new Certificate and Extent; but the Executor or Administrator, upon his oath in Chancery, and shewing of the Testament, or Letters of Administration, shall have a Liberate, without being put to a new Certificate and new Extent, because it is all in one and the same Court. And the Clerk of the Petty bagge said, It is the usuall course in Chancery, when there is an *Extendi facias* upon a Statute Staple, or a Recognisance in nature of a Statute Staple, at the Suit of one, who dies, That the Executor or Administrator, upon his oath, That he who sued it, is dead, is to have a Liberate reciting the former Extent. And of this Brampton doubted: Et adjournatur. Vide residuum postea pag. 457.

King and his Wife *versus* Fitch. Ante pag. 414.

24.

Error of a Judgement in Waste. Babington assigned for Error (which was not any of the Errors assigned in the Record) That Judgement being given by default in a Writ of Waste, made in Domibus, Gardinis, & Pomariis, assigning the Waste to be done in the Houses in divers places, and in the Orchard, in cutting down of twenty Apple-trees; And upon the Writ of enquiry of Waste, the Waste being found to be in cutting down of two Apple-trees, &c. Et quod nullum aliud fecerunt vastum: That this finding is imperfect. Secondly, Because Waste is found in cutting

cutting down two Apple-trees, and that the Plaintiff ought to be in Misericordia for the residue, which is not so entered, therefore Error: For the presidents are, That where Waste is found in part, Et quod nullum aliud fecerunt vastum; As where Waste is assigned in cutting down twenty trees, and the Jury finds, that he cut down but two trees, or less than the Plaintiff assigned, the Plaintiff shall be in Misericordia. Berkeley held, That it is here good enough; For true it is, There is a diversity where the Writ of Waste and the Count is in Domibus, Boscis, & Gardinis. And upon the Writ of enquiry of Waste, the Waste is found in Domibus & Gardinis and nothing in Boscis; There the Plaintiff shall be amerced, because he counts for Waste in places where no Waste was committed in the one of them: But where Waste is assigned in cutting down twenty trees, and the Waste is found in cutting down two trees, and so varies only in quantity, it is otherwise. But Jones and my self doubted thereof. Vid. 14 Ed. 3. Waste 27. 22 Ed. 3. 1. Book Entries 620. Coke 8. fol. 61.

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Termino Paschæ, anno duodecimo Caroli Regis,
in Banco Regis.

Humphrys *versus* Knight. Trin 7 Car. rot. 779.

Ejectione firmæ. Upon an especiall Verdict, and Not guilty pleaded, the Case appeared to be such. Robert Coldham, Citizen and Free-man of London, being formerly seized in Fee of six Messuages, in the Parish of St. Mary Magdalens, devised those Tenements by his Will in writing, anno sexto, Henrici septimi, to the Parson and Churchwardens of the Parish of St. Mary Magdalen, and their Successors, to the intents and purposes following, viz. That the Churchwardens of the said Parish should receive the profits of the said Tenements; And that ten Marks yearly of the profits should find a Chaplain for ever, to sing every day at the Altar of the said Church, and to pray for the souls of him and his Ancestors; and to find an Anniversary there, and to expend thereupon thirteen Shillings four pence yearly; And the residue of the profits thereof, to be employed about the reparations and Church. And they found the Customs of London, That the Parson and Churchwardens are a Corporation, to purchase to the use of their Church, and that a Free-man and Citizen of London may devise Lands in Mortmain: And they further find, That ever since the said Will, the said ten Marks per annum were employed accordingly, for the finding of a Chaplain, and the 13 s. 4 d. per annum for the maintenance of an Anniversary, untill the making of the Statute of 1 Ed. 6. And that a quit-rent of 42 s. per annum, was issuing out of the said Tenements at the time of the Will and Statute, and paid to the King: And that the Tenements devised at the time of the Will, and untill the said Statute, were of the annual value of 9 l. 4 s. and no more, yearly; That the Lands were seized into the hands of King Edward the sixth; And by him granted away to J. S. under whom the Defendant claims: And under the Parson and Churchwardens the Plaintiff claims, as Lessee. And, Whether these Tenements were given by the said Statute to the King, was the sole question: And after arguments at the Barre, it was resolved, That these Lands were given unto the King. For although it was objected by

by Grimston, That the Land was not given for the maintenance of a Priest, but only a certain summe of 6 l. 13 s. 4 d. yearly; For the Land being appointed for the reparation of the Church, with the residue of the profits thereof, it being a good use, shall have the Land; Yet the Court held, That for as much as it was but the residue, si quid fuerit; which is incertain, if any shall be or no. And it appears by the Verdict, That the Land was charged with a quit-rent of 42 s. yearly, and the superstitious uses amounted to 7 l. 6 s. 8 d. And that at the time of the Will and untill the Statute, the Land was valued but at 9 l. 4 s. yearly, and no more; and, That the profits imployed with the quit-rent, appeared to amount to 9 l. 8 s. 8 d. which was 4 s. 8 d. more than the Land yearly yielded, and so no residue: Therefore to be within the words and intent of the Statute, that is to say, the first and third branch; and, That the principall cause of this gift, is the mainteining of a Priest and an Annibersary, and wherewith and wherby a Priest and an Annibersary were maintained. See for this Cok, lib. 4. fol. 110. & 112. in Adam and Lamberts Case. And although it hath been objected, There may be improvement expected of the houses, there being six houses; it was thereto answered, That is not to be intended; For the value is to be regarded, as it was at the time of the Will making, at least as it was at the time of the making of the Statute of 1 Ed. 6. and a greater value shall not be expected; and if it were of a greater value after, it is not considerable; for it is to be respected as it was at the time of the Statute made, as 6 Ed. 2. Voucher 258. 19 H. 6. 46. Vouchee shall not render in value more than it was at the time of the Warranty; and the value of the Land is to be respected as it is ultra Reprisas. And a Case betwixt Drake and Hill, adjudged 8 Car. in the Common Bench, was cited, That the 8 l. value of a Church shall be according as it is valued in the valuation of the Benefices, and not according to the true value, as it is upon improvement, although diversity of opinions have been therein before, For the Statute intends as it was valued in the ancient book of first-fruits and Tenths, which was tared 29 Ed. 1. And after, when another valuation was made, 26 H. 8. then according to that valuation. Wherefore this Land being charged with a quit-rent of 42 s. the residue not amounting to the value appointed for the superstitious uses, It was adjudged for the Defendant. Vid. 43 Ed. 3. 8. 27 Ed. 3. 1. 7 H. 3. Dower 192.

Pew and his Wife *versus* Jeffries.

2.

Suit being in the Spiritual Court, for calling the wife Welsh Jade and Welsh Rogue, Sentence being there in the Arches, The Defendant appealed to the Court of Audience; and in the Appeal mentioned the former words; and in the Libell was interlined, And a Welsh Thief: And hereupon a Prohibition was prayed and granted

granted, unless cause were shewn by such a day to the contrary: For it was held cleerly, That for the word Welsh Thief Action lies at the Common Law, and they ought not to sue in the Spirituall Court: And for the other words, It was conceived upon the first motion, They ought not to sue in the Spirituall Court; for they be words only of heat, and no slander. But it was afterward moved and shewn, That the said words, A Welsh Thief were not in the first Libell, nor in the Appeal at the time of the Appeal, but were interlined by a false hand, without the privy of the Plaintiff, in the Spirituall Court; and that upon examination in the Spirituall Court, It was found to be falsly inserted and ordered to be expunged. And that the words Welsh Jade, were shewn in the Libell to be expounded, and so known to be a Welsh Whore; which being a spirituall cause and examinable there, it was therefore prayed, That no Prohibition should be granted: And if a Prohibition was issued forth, that a Consultation might be awarded; And the Court was of that opinion, For the words, And a Welsh Thief, being unduely interlined, and by authority of the Spirituall Court expunged, and in the Spirituall Court, Jade being known, and so expounded for an Whore; and especially, being after two Sentences in the Spirituall Court, That the Common Law ought not to intermeddle therewith: Wherefore Consultation was granted, if any Prohibition was issued forth Quia im-provide; And Rule given, That if a Prohibition was not passed, That none should be.

Cleve versus Veer. Cujus principium. pag. 450.

3.
WAS now moved again, absente Brampton. And Jones and Berkeley argued, That this extent made after the death of the Conussee was meerly void: For by the Conussee's death (as Berkeley said) the Writ of extent is abated in facto, And that the Sheriff hath not any authority to extend the Lands: For the Writ is, That he shall extend and seize into the Kings hands ut ei liberemus; And when he is dead, there is not any Warrant to deliver them to his Executor or Administrator; for it is particular ut ei liberemus, and he is not to deliver it to any other, And compared it to the Cases 25 Ed. 3. 2. 18 Ed. 3. 10. & 26 Eliz. Dy. 180. That if a Conussee of a Statute Merchant procures a Certificate upon the Statute, and thereupon a Capias, retournable in the Common Bench or Kings Bench, And the Capias being returned Non est inventus, and the Conussee dies before another Execution is awarded, The Executor might not have Execution, but were directed to bring a new Certificate and a new Capias out of the Chancery. Secondly, Berkeley held, That if the extent had been well returned, yet the Administrator comming *paramount*, the Executor cannot have the benefit thereof, as 29 Hen. 6. 7. And Jones was

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of the same opinion, and cited the Case betwixt Beamond and Long in this Court; Quod vid. ante pag. 208. & 227. Also Berkeley said, That as the Verdict is found, the Plaintiff ought not to have Judgement; For it is an Ejectione firmæ of the capitall Messuage, Sive scitum Manerii de B. and one hundred and twenty acres of Land, one hundred of Pasture, &c. in B. which Declaration is not good for the Messuage, because it is in the disjunctive, but it is good for the Land, and there is no title found for the Defendant for the Land. For the Verdict finds, That the said Edward Dobbs, the Les. for & the Conusor, was seized in tail of the Manor of B. at the time of the Recognisance; And that this Manor was delivered in extent; but he doth not say, That the Land in the Declaration was parcell of the said Manor; And so it is not found, That this Land was delivered in Extent, and then the Defendant hath no title. But Jones agreed with me, That this is not materiall; For being in an especiall Verdict, it is intended, otherwise there would be no cause of a speciall Verdict. See for this point Coke 5. fol. 95. Goodales Case. So for the matter Jones and Berkeley agreed, That Judgement should be given for the Plaintiff: But I argued to the contrary, because this Extent upon the Statute is in nature of a Statute Staple, Where all the proceedings are in Chancery, and not like to Executions upon Statutes Marchants, Where the beginning is upon a Certificate made in the Chancery, and a Capias is awarded retournable in the Common Bench, or Kings Bench; For there peradventure, as the Case is 18 Ed. 3. 10. & Dyer 180. Where the Conusor dies before Execution, the Executor shall not proceed in the Execution, upon Non est inventus returned, without a new Writ out of the Chancery, because it is their Warrant to proceed in the Common Bench; but an Extent upon a Statute Staple, and the proceedings thereupon, are all in the Chancery; And then, although the Conusor dies betwixt the Writ of Extent, and the return thereof; yet being but a preparation unto the Execution upon his Cognisance, what Lands are extendable and the value of them, and to seize them into the Kings hands, ut ei liberemus, none hath answered to it; And it being returned there, it is in vain to have a new Enquisition, it being all of Record in the same Court. Secondly, Although the Conusor dies before the return of the Writ, there being a good Enquisition, it is well enough; And although it be an Enquisition after the death of the Conusor, yet it is good enough; For the Sheriff did that which the Writ enjoined him, viz. to enquire what Lands the Recognisor had at the time of the Recognisance acknowledged, or after, of what annuall value, and to seize them into the Kings hands, ut ei liberemus, That is only to shew the Kings intent; and the seizure into the Kings hands, makes not any Title to the King, nor puts the possession in him, but is only matter of form; As it is in 3 Ed. 6. fol. 67. Although an Enquisition be after the death of the Conusor, yet it is as good as if it had been in his life; for the Sheriff may not take notice of

of the death of the Conusee, but he ought to return how he served the Writ; And if he return that the Conusee is dead, he shall be amended, as 10 Hen. 4. 5. & 7. & 31 H. 6. 28. are: And there is a difference betwixt a Judiciall Writ, after Judgement to doe execution, and a Writ Originall; For the Writ Judiciall, to make execution, shall not abate, nor is abateable by the death of him who sues it; as it is the common course, if a Capias ad satisfaciendum, or a Fieri facias upon Judgement issueth, the Sheriff shall execute it, although the party who sued it died before the return of the Writ, and although the death be before or after the Execution, if it be after the Telle of the Writ, it is well enough. As where a Capias ad satisfaciendum is sued, and the party taken before or after the death of him who sued it, and before the day of the return; or if a Fieri facias be awarded, and the money levyed by the Sheriff, and the Plaintiff dies before the day of the return of the Writ, yet the Executor or his Administrator shall have the benefit, and is to have the money: And it is no return for the Sheriff to say that the Plaintiff is dead; and therefore he did not execute it. And for the second point I argued, because it is not a Suit by way of Action, as a Scire facias, or Debt, which I agreed, The Administrator shall not have, upon a Judgement obtained by the Executor, because he comes *paramount* the Executor. Vid. Cok. lib. 1. fol. 96. & lib. 5. fol. 4. Brudnells Case. Yet this being no Suit, but the praying of a Liberate upon the shewing of the Letters of Administration; the Administrator may well have it; and he is the party who hath the privity to demand it, for the benefit of the Intestate: And if the Executor had had the extent well executed, and the Liberate thereupon well delivered, and were in possession thereof, and died intestate, The Administrator of the first man, in whose right the Extent was sued, should have it, as Jones agreed afterwards in his Argument: So where it is only to demand delivery, he may do it well enough. But notwithstanding these reasons, Jones and Berkeley appointed, (Brampston chief Justice being in the Court of Wards) That Judgement should be entred for the Plaintiff: For Jones said, That Brampston delivered unto him his opinion for the Plaintiff; because the extent taken after the death of the Conusee, although it was returned in the Chancery at the day of the return of the Writ, was meerly void; and so the Defendant had not any Title thereby; Wherefore Judgement was entred accordingly for the Plaintiff.

Webb *versus* Nicholls.

ERror of a Judgement in the Common Bench, in an Action upon the Case, for words. Where Nicholls declared that he was an Attorney in the Common Bench, and so had been for fifteen years; and whereas one Humphry Scile had retained him for his Attorney, to prosecute a Suit against J. D. That Webb, *præmissorum non*

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ignarus, intending to scandalize him in his Profession, and to dissuade others from retaining him, having Communication with the said Humphry Stile, falsely and maliciously said of him, the said Nicholls, these words, I marvel you will imploy such a Knave as *Nicholls* (innuendo the Plaintiff) You will have but disgrace and discredit by imploying him. He (innuendo the Plaintiff) is a proclaimed Knave in the Market. Quorum præmissorum prætextu, he was much prejudiced in his Profession, many of his Clients withdrawing from him, &c. The Defendant pleads Not guilty, and found against him, and damages assent to 200 l. and upon this Judgement Error brought and assigned, because the words were not actionable; For he doth not say, That the communication was with the said Humphry Stile of the said Suit, nor is it shewn, That the words were spoken of the imployment in his Profession; and therefore Heath Serjeant moved, That an action lies not for these words; For to call an Attorney Knave, is but a word of heat, and a word for which no Action lies; and to say, He is a proclaimed Knave in the Market, is but an aggravation of the word Knave. And this Case differs from Bychleys Case, Cok. 4. fol. 16. For there he saith of him being an Attorney, You are known to be a corrupt man, and to deal corruptly; so as those words cannot have any other exposition then as touching his Office of Attorney: But it is not so here, &c. But all the Court held, That the Action well lies; For it is not intendable, but that he spake of him as an evill dealer in his Profession; for he speaking with him, who used the said Plaintiff in a Suit, and speaking to him the words, ut supra, they have relation to his Profession, and cannot have other intendment, especially the Plaintiff alledging, That he spake them to scandalize him in his Profession; and the Defendant pleading Not guilty thereunto, and being found guilty, according as the Plaintiff hath counted; Wherefore the Judgement was affirmed.

5. **M***emorandum*, That upon Saturday before the end of the Term, the King caused his Proclamation to be published the same day in Chancery, That in regard of the increasing of the Pestilence in *London*, and the places thereto adjoyning, and the danger it might disperse into the Country, he resolved to adjourn the Term from *O^{ct}ab. Trin.* untill *Tres Trin.* And that the said returns should be only for furtherance of the ordinary Proceedings; And that no Proceedings should be upon Demurres or speciall Verdicts, nor any Hearings in the Starre-chamber, or in any the Courts of Equity.

Stone *versus* Newman. Ante pag. 427.

6. **T**his Case was now moved again upon exceptions to the pleading, First, Because there is not any seisin alledged in the Queen. And then Sir Francis Wiatts title is good untill seisin; for he

he had the first possession. Sed non allocatur; For it appears, That after the Attainder, the Queen being entituled by the generall Act of Parliament, of 33 H. 8. and by the Special Act of primo Mariae, of the Attainder of Sir Thomas Wyatt, it was in the Queen without office; and that the Queen granted it by Patent unto him, under whom the Plaintiff claims, who entered, and was seized untill Sir Francis Wyatt entered and distrayned for damage feasant; so he had the priority of possession and right (as it was now held by the greater opinion;) wherefore this exception was disallowed. The second exception was, That the Endowment was by virtue of a Commission granted to divers persons; And he doth not say, sub magno Sigillo Angliae, And that the Attainder was upon the Tryall before the Commissioners, and he doth not say, sub magno Sigillo; so as if it were not sub magno Sigillo, it is not good. And in proof thereof, the pleading in the Common Bench in Moultons Case was remembred, That the Commission was sub magno Sigillo: And in Huntleys Case, in this Court, Because the deprivation was found before the Commissioners Ecclesiasticall, virtute Commissionis to them directed; and he doth not say sub magno Sigillo, it was held to be ill; and Cok, lib. 5. fol. 51. Letters Patents were pleaded sub magno Sigillo. And although it be true, That in Plow. Comment. in Walsinghams Case, it is pleaded as here, and doth not say sub magno Sigillo, and yet Judgement given; It was said, That was because no exception was taken thereto. And in Cok. lib. entr. fol. 174. the Commission is pleaded by Letters Patentes sub magno Sigillo, and an Attainder by virtue thereof, & ibid. 194. in the Case of Sir Moyle Fynch, it was so likewise pleaded: So generally the pleading is sub magno Sigillo: Otherwise it is ill, and as no Attainder pleaded. And of that opinion was Jones at the first; but after ward, upon search of Precedents, whereby it appeared, that sometimes sub magno Sigillo was omitted; and when it is shewn, Quod per literas Patentes Commissionis (omitting sub magno Sigillo) It is to be intended under the great Seal, and not otherwise. All the Court agreed, That although it were the better course to shew, that it was sub magno Sigillo, yet being omitted, it is well enough; and good both wayes: And they agreed, That here, according to the greater opinion in the Exchequer Chamber, Judgement should be entered for the Plaintiff.

Porters Case.

UPON the Statute of primo Jac. cap. 11. Porter was indicted, for that he being lawfully married to Porter, and he then living and he well knowing thereof, felonice espoused one Rooks, contra formam Statuti. Upon Not guilty pleaded a speciall Verdict was found, That he was lawfully espoused to the said Porter; And that before Sir John Lamb, Judge of the Court of Audience, he had sued a Divorce from the said Porter

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propter sævitiam: Where, upon prosecution, it was decreed, Quod propter sævitiam of her said husband towards her, she should be separated à Mensa & Thoro from her said husband; but no word of divorciamus was therein: And it was expressly intimated in the Sentence, That she should not marry to any other during the life of the said Porter. And this Sentence was found in hæc verba. And that afterwards, within six moneths, the said Porter living and she knowing thereof, espoused the said Rooks. And if she be guilty of the felonious marrying of a second husband, against the form of the Statute, they prayed the Discretion of the Court: And it was argued at the Bar by Germin, for the King, That it is felony within the Statute; for she is directly within the words of the body of the Act, She being married to one man and he being alive, and she (knowing thereof) marrying to another. And the Proviso shall not aid her; for that doth not extend but only to persons which are divorced by Sentence in the Spirituall Court; but here is not any Sentence of divorce, but only a separation from her husband à Mensa & Thoro, which is only a liberty to live from him, and a prohibition only for her safety, That she shall not live with him, to avoid his misusing of her by his cruelty: And there is not one word of divorciamus in the sentence, as there is in every case of Divorce; therefore she is out of the Proviso. And this is none of the Divorces mentioned 47 Ed. 3. folio ultimo; Where it is found, that there be but five Divorces, viz. causa Professionis, causa Præcontractus, causa Consanguinitatis, causa Affinitatis, & causa Frigiditatis: And this Divorce is none of them; and the Proviso doth not intend, but when there is sentence of an absolute Divorce. But Holbourn and Grimston, for the Defendant, argued strongly to the contrary; for it is a penall Law concerning life, and therefore ought to be favourably expounded in favorem vitæ, and that the Proviso extends to this kind of Divorce; for there be Divorces ex causa precedente: As in the Cases of Divorces cited, which be not properly Divorces, but rather Sentences of nullifying the Marriage, which is not intended in the Proviso; for such a Marriage was void of it self: And by the Sentence declaration is made That it was void ab initio: And so it is where Marriage is infra annos nubile; and such Divorces are declared Null, & by such Divorce the parties are freed à vinculo Matrimonio. But there be Divorces ex causa subsequente, as causa Adulterii, which, in the intention of some, is an absolute Divorce, and that the party innocent might marry again: But others conceive, That it is no absolute Divorce, but only a separation à Mensa & Thoro, and frees the parties from the performance of conjugall duties only, the one with the other. For although in former times, it was questioned, whether such parties divorced might marry again, yet now it is made clear by the Canons, that they may not. And to avoid this question principally, this Proviso was added in the Statute, That where sentence of Divorce is given, such persons marrying shall not be in danger

ger to be Felons by this Statute. By the same reason in this Case there being a Sentence of Divorce, although it doth not dissolve parties à vinculo Matrimonii, yet an ignorant woman cannot know that distinction, But they conceive when there is a Sentence of Divorce, that they are out of the Statute. And although there be no such word as divorciamus in the Sentence, yet there is separamus; And the word divorciamus is not usuall, but separamus. And Cok. Lic. 235. shews what divorces be à vinculo Matrimonii, which are the Divorces before cited in 47 Ed. 3. 27. which are causes precedent the Marriage; And by such Divorces the issue is made a Bastard, and thereby declared, That they were not justæ Nuptiæ. But Divorce causa Adulterii, is no dissolution à vinculo; but only à Mensa & Thoro; and therefore the Coverture continues betwixt them. And to that purpose a Case was cited Pasch. 40 Eliz. rot. 292. betwixt Stevens and **Where the Husband, after such Divorce causa Adulterii, released an Obligation made to his wife before the Coverture, And it was adjudged a good release; which proves, That the Marriage continues. And another Case Trin. 2 Jac. rot. 815. one Stowells Case, That the wife, after such Divorce, should have Dower of her husbands Land; which proves, That the Espousalls continue betwixt them. But a Divorce causa sevitia, is grounded ex jure Naturæ, and is in the same manner and nature as a Divorce causa Adulterii: And the Proviso in the Statute is, That the parties divorced by Sentence, if he takes another wife, or the wife takes another husband; shall not be within the danger of the Statute. And this extends to every manner of Sentence of Divorce, and not to any particular cause of Divorce: And so concluded, That he is within the Proviso of the said Statute, and so Not guilty of the felony. But the Court much doubted whether he were within that Proviso: And if this should be suffered, many would be divorced upon such pretence; and instantly marry again, whereby many inconveniences would ensue. Whereupon he was advised, not to insist upon the Law, but to procure a Pardon to avoid the danger: For it was clearly agreed by all the Councillors and others, That this second Marriage was unlawful, and that he might be in danger to be adjudged a Felon by this Statute.**

Termino



Termino Trinitatis, anno duodecimo Caroli Regis,
in Banco Regis.

Anonymus.

1. **S**cire facias. Upon a Judgement given in Debt for *Baron* and *Feme*, as Administratrix to her first Husband, the *Feme* being dead after Judgement, and before Execution, the *Baron* brought a Scire facias, and upon the Sciri feci returned, obtained a Judgement by Nihil dicere; and this being a Judgement of the last Term, Rolls now moved to stay Execution; For the Debt being due to the *Feme* as Administratrix, although the Recovery be by the *Baron* and *Feme*, he being dead, the *Baron* may not have Execution upon this Judgement: For the Debt was due to the *Feme* in *Auter Droit*: And of this opinion was all the Court, That the Scire facias ought not to be brought by the *Baron*, but being sued, and Judgement obtained thereupon the last Term; although the Judgement be erroneous, yet it ought to stand untill it be reversed by Error. But whether he may have a Writ of Error in the Exchequer Chamber, Tam in Redditione Judicii, quam in Redditione Executionis, Jones and Berkeley doubted; For upon a Judgement in a Scire facias in this Court, there lies no Writ of Error in the Exchequer Chamber. But I held, for as much as this Scire facias is but to have Execution grounded upon a former Judgement, That it is within the Statute of 37 Eliz. and that a Writ of Error lies in the Exchequer Chamber to reverse the Judgement and the Execution: And although there be no Error upon the Judgement, but that it be affirmed, yet the Execution may be reversed: But Brampton Chief Justice doubted thereof; Ideo Curia advisare vult.

Cholmleys Case.

2. **E**ndictment, against Jasper Cholmley and John Cholmley of Hoxton, in the County of Middlesex Gent. For that they Insultum fecerunt upon John Higham Doctor of Physick, in Ecclesia de *Shoreditch* prædicta; Et prædict. *Joh. Higham*, ad tunc & ibidem, in Ecclesia de *Shoreditch* prædicta, verberaverunt, vulneraverunt, & malè tractaverunt contra formam Statuti, &c. Upon this the grand Jury find Billa vera quoad Jasper Cholmley, and Ignoramus for John Cholmley; And hereupon he appeared, and pleaded Not guilty, and found against him. Rolls now moved in an Arrest of Judgement, That the Endictment was not good, being Fecerunt, whereas

whereas it is found only *Billa vera* against one. Sed non allocatur; Because it was exhibited against two, and it is but false *Latine*. Secondly, Because the *Endicement* is contra formam Statuti, and this offence is not punishable by the Statute, unless that he smote with a weapon, or drew a weapon in the Church, or Church-yard, or drew a weapon to that intent, which is not mentioned in the *Endicement*: And by the second Clause in the Statute, for smiting or laying violent hands, it is excommunication ipso facto; and it is not mentioned here how he stroke, and thereof the Justices doubted. But Jones said, That the *Endicement* was good for Battery at the Common Law. But all the other Justices were against him therein; for the *Endicement* concluding contra formam Statuti, it cannot be good, as for an offence at the Common Law. But afterwards another exception was taken by Grimston, Because the offence was alledged to be done in the Church of Shoreditch aforesaid, and Shoreditch was not named before: And upon view of the *Endicement*, it appearing to be so, all the Court held, That the *Endicement* was void: And for this cause the Judgement was stayed.

Mary Smiths Case.

Mary Smith and others were *Endicted* upon the Statute of 4 & 5 Ph. & Mar. cap. 8. in the County of Midd. before the Justices of the Kings Bench; Because they took and conveyed away Frances the Daughter of Scipio Squire, being under the age of sixteen years unmarried, and in the custody, and under the government of her said father, without his consent & contra formam dicti Statuti: And upon this, Mary Smith pleaded Not guilty, and was found guilty: And it was moved in arrest of Judgement, That the *Endicement* in this Court was not good: Being *Coram non Iudice*; Because the Statute appoints, That for this offence the party offending shall be punished by two years imprisonment, or shall pay such a fine as the Star-chamber shall appoint. And the words in the Statute are, That the Councell in the Star-chamber, and the Justices of *Mise* by Inquisition or *Endicement*, shall have power to hear and determine, &c. And whether this may extend to Justices of the Kings Bench, to give them authority to inquire, was the question, Or only to Justices of *Mise*? And whether Justices of the Kings Bench be not Justices of *Mise*? But of this the Court doubted, Because there be no Justices of *Mise* for the County of Midd. The second question was, Admitting they may hear and determine, Whether they may impose any fine; or only give Judgement for the imprisonment; Because the fine is appointed to be assessed in the Star-chamber, and in no other place? Quare,

4. **M***Emorandum*, That in regard of the increasing of the Pestilence in *London*, and the places adjoyning, The King, according to his Proclamation formerly made, directed his Writs of adjournment to the Kings Bench, Common Bench, and the Exchequer, to adjourn the Term from *Octabis Trinitatis* unto *Tres Trinitatis*. And upon the same day of *Octabis* all the Courts sate untill eleven of the Clock in the forenoon, and heard motions concerning matters in arrest of judgement, and pleadings, and Endictments, and Writs of Error; where it appeared, That the Writs of Error were brought for delays of Execution, and no colour of Error: But no Judgements in any Demurrer, or matter in Law upon speciall Verdict, unlesse it were in Cases which were moved the last Term; and rule given, That if cause were not shewn the first or second day of this Term, Judgement should be entred for the Plaintiff or Defendant, as the case required. There, upon motion, although it were upon Demurrer, or speciall Verdict, no cause being shewn to the contrary, the Court gave Judgement according to the former rule: And so Justice *Hutton* said they did in the Common Bench. And afterward upon the same day *Brampton* chief Justice published, That whereas the Prisoners of the Kings Bench and Fleet had severall times petitioned the King, for avoiding the danger of the infection of the Plague much increasing, That they who could give sufficient security to the Marshall or to the Warden of the Fleet, to be true Prisoners, and to return to Prison at the dayes to them prescribed, might go at large by *Habeas Corpus* for that time (as they pretended was the antient course in former times, upon the like cases.) And all the Justices and Barons of the Exchequer, besides the Lord *Finch* chief Justice of the Common Bench, and Baron *Denham* (who were not in Town) being assembled at the Lord Keepers house, to consult of this matter, and what course was to be taken for the safeguard of the Prisoners, upon conference with the Lord keeper, resolved, That an *Habeas Corpus* was an ancient and legall Writ; but under colour thereof, the Warden of the Fleet, and Marshall of the Kings Bench ought not to suffer Prisoners to go at large, but that such permission is an abuse of the said Writ, and an escape in the Keeper of the Prison: But for the safeguard of the Prisoners (who might if they would provide for themselves by payment of their debts, and be discharged) the Warden of the Fleet, by rule or licence of the Courts to which they are subject, and the Marshall of the Kings Bench, by rule from the Kings Bench, may keep their Prisoners in any other place in the Country, to be assigned by the Courts unto them: But there they ought to be kept as prisoners, *sub salva & arcta custodia*, as they ought to be in their proper Prisons. And this resolution was delivered unto the King under all their Hands; And the King signified his pleasure, That he very well approved thereof, And commanded, That it should be observed. And it was remembered, That in *primo Caroli*, when the Term was at *Reading*, such resolutions were by all the Justices. And afterward, about eleven of the Clock the same day, the Writ of Adjournment was opened, and openly

ly read; and the Term was adjourn'd untill *Tres Trinitatis*. *Note*, That neither Chancery, the Exchequer Chamber, nor the Dutchy Court did sit all this Term.

Stone *versus* Lingar, and others.

Action upon the Case. Whereas the Plaintiffs were Inhabitants, and possessed of such Lands for years in the Parish of St. Martins, and were there liable to the payment of all duties for the Reparation of the Church of the said Parish, and to all taxes and charges within the same. That the Defendant being Constable of Roxborough, falsely presented; That they were Inhabitants in the Parish of Roxborough, and possessed of the said Lands in the Parish of Roxborough, and chargeable there to the payment of such duties; by reason whereof, they were compelled to pay such summes unduely; For which they brought this Action. Upon Not guilty pleaded, the Defendant was found not guilty. And Grimston moved for the Defendant to have double costs, because wh it he did, was by virtue of his Office; and by the Statute of 7 Jac. cap. 5. he ought to have double costs. But on the other side it was moved by Atkins, That this being a speciall Action upon the Case for false Presentment (and not an Action of Trespass or false Imprisonment) wherein liberty is given to plead Not guilty, and give the speciall matter in evidence. And the question being, In what Parish the said Lands were? That it was out of that Statute, but within the Statute of 23 Hen. 8. which gives single costs to the Defendant. And of this opinion was all the Court, and gave rule accordingly.

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Termino Paschæ, anno decimo tertio Caroli
Regis, in Banco Regis.

Humphrys *versus* Stanfeild.



ction for words. **W**hereas the Plaintiff being
Sonne and Heir apparent to John his father,
who was posses of goods to the value of 200 l.
and seized of Lands to the value of 40 l. per an-
num; and whereas William Humphrys, his An-
cle, was seized in fee of Lands of the value of
40 l. per annum, and he the Plaintiff, was in like.

I.

lyhood to be his Heir: **T**hat the Defendant, to disgrace the Plain-
riff, and to make others have an ill opinion of him, said maliciously
and falsly of the Plaintiff, Thou art a Bastard. Upon Not guilty
pleaded, and found for the Plaintiff, and damages assent to 40 l.
Maynard moved in arrest of Judgement, **T**hat these words be not
actionable, because he doth not shew any particular damage. But
all the Court held, **T**hat the Action lies; For by reason of these
words, he may be in disgrace with his father and Uncle, and they
conceiving a jealousy of him touching the same, 'tis possible they
may disinherit him; and although they do not, yet the Action lies
for the damages which may ensue. And Jones cited, **T**hat in the
Erchequer Vaughan brought an Action against Leigh, surmising,
That Land was given to the Plaintiffs Grandfather, and to the
Heirs Males of his body; And that he had Issue the Plaintiffs
father, who had Issue the Plaintiff and divers other Sons then
living, who by possibility might be Heir to that Intail: **T**hat the
Defendant said of him, Thou art a Bastard, whereupon he brought
his Action, and it was adjudged maintainable, and this Judge-
ment affirmed in a Writ of Error. And another Case was cited to
be so resolved in this Court, betwixt Banister and Banister. And
of this opinion was all the Court; **W**herefore rule was given,
That Judgement should be entred for the Plaintiff, unless, &c.

Ban 3

William

William Slaters Case.

2. **W**illiam Slater was, by Elizabeth Eaton, charged with the getting of a Bastard Child on her body. The two next Justices did not make any Order in it, according to the Statute of 18 Eliz. but the Cause came first to be originally heard at the generall Sessions of the Peace at Spaulding in the County of Lincoln, 13. Jul. 8 Car. where the Justices ordered, That whereas it was proved by witnesses, that one Alexander Leigh had often used private company with the said Elizabeth Eaton, and had confessed that he had done as much to her as a man could do to a woman; And that she had said, That Leigh had the use of her body, and that she feared she was with child by him. That thereupon Slater should be discharged of the child, and she be committed to the House of Correction, during her life; And that Alexander Leigh, the reputed father, should pay from the birth of the child, to the Churchwardens of Pinchback weekly 14 d. towards its maintenance, until the age of fourteen years; And the Overseers then to take the child. Afterwards 1. August 12 Caroli, at the Assises at Lincoln, upon complaint of the Inhabitants of Pinchback to the Judges, they ordered, That two of the next Justices, to the Parish where the Child was born (naming them) should take consideration thereof, according to the Statute, and take such course therein, as to Justice appertained; whereupon those two Justices primo Martii, 12 Caroli, declared the said William Slater to be the reputed father, and that he should pay (the Child being five years old, and all that time having been maintained at the Parish charge) at one payment 18 l. to the overseers of the said Parish, and 14 d. weekly till the Child came to fourteen years of age, and to give his Bond of 50 l. for performance thereof: And the said Slater refusing to pay or give Bond, the said Justices of Peace committed him. Whereupon he sued out a *Cerciorari* to remove the proceedings into this Court, who appearing upon an *Habeas Corpus*, and upon reading of the return, and hearing Counsell on both sides, Grimston being of Counsell for the said Slater, these points were resolved by the whole Court. First, That before the Statute of 3 Caroli cap. 4. the Justices at the Sessions had no authority to meddle in the case of bastardy, till the two next Justices according to the Statute of 18 Eliz. cap. 3. had made an order therein: and that then, and not before (the partie refusing to perform the order, upon his appeal giving reasonable security to appear at the next Sessions, and abide such order as the Justices there, or the more part of them should make, &c.) The Justices at the Sessions might make a new order, &c. otherwise not. Secondly, That by the Statute of 3 Car. cap. 4. the Justices of the Sessions have power and authority originally, to make an order in the case of bastardy; for the words of the Statute are, viz. That all Justices of the Peace within their severall Limits and Jurisdictions,

precincts, and in their severall Sessions, may do and execute all things concerning that part of the Statute touching Bastards, begotten out of Lawfull Matrimony, That by Justices of the Peace in the severall Counties are by the said Statute limited to be done. And therefore the first Order made by the Sessions was in this case good and legall, and the second Order made by the two next Justices, void, and could not alter or revoke the Order which was first made by good authority: And for proof thereof one Pridgeons Case, Quod vide ante pag. 341. & 350. was cited. Thirdly, It was objected, That the commitment of Elizabeth Eaton for life, for her first offence, was more than the Justices had authority to do; and therefore the Order void. But it was resolved, That an Error in part, and in that part of the Order which only concerned her, should not vitiate the whole Order.

Goodier *versus* Platt. Hill. 11 Car. rot. 349.

Error of a Judgement in the Common Bench, in Formedon. The Judgement was upon Verdict, Quod recuperet seisinam de uno Mesuagio & duabus acris Terræ & Pasturæ, not mentioning severally the quantity of the Land, nor the quantity of the Pasture, which being ill for the incertainty, it was moved, That the Judgement might be affirmed for the Mesuage, which is certain as to that. But it was held, That though the Common Bench might have given Judgement for the Mesuage only; yet when they have given an intire Judgement for the Mesuage and Land, this being ill in part, ought to be reversed for the whole; And cannot be affirmed for part and reversed for the residue.

3.

Turner *versus* Lee.

Replevin. The Defendant avows as Executor, for the arrears of a Rent charge, granted to the Testator for divers years, if he lived so long. The Plaintiff takes issue, Quod non concessit, and found for the Avowant. And after Verdict it was moved in arrest of Judgement by Rolls, That this avowry was not good, because the Rent granted for years, being determined, The Executor cannot, by the Statute of 32 Hen. 8. disclaim: For that Statute extends to those who have Rent for life or Inheritance. But Henden Serjeant said, That it is within the equity of the Statute, because the estate is determinable upon a life. And if it were not good, yet being admitted, and the Issue being upon the grant, and found, It is good enough. But all the Court resolved, That it is not within the Statute; for that provides remedy where the Testator dyed seized of a Rent to him and his heirs, Or for life, and by his death there was not any remedy for the Executor, as it appears by the preamble of that Statute: But where he hath remedy by the Common Law, by Action of Debt, as in this Case the Executor hath,

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hath, he cannot disstrain; And although the Issue is upon a Non concessit, and it is found Quod concessit, yet it being an ill Answer in substance, Judgement shall be given against him.

Anonymus.

5. **A**ction for words. Whereas the Plaintiff was a Grocer, and lived by his Trade of buying and selling, That the Defendant, to scandalize him, said of the Plaintiff, He is a Beggerly fellow, and not able to pay his Debts. Upon Not guilty pleaded, and found for the Plaintiff, Rolls moved, That these words were not Actionable. But all the Court, against him, That the Action lies; For these words tant amount, as if he had said, he had been a Bankrupt.

Snape *versus* Turton.

6. **U**pon a speciall Verdict it appeared, That Arthur Robsart, 15 Eliz. made a Conveyance to divers uses, (viz.) to the use of himself for life, with divers Remainders over, with a proviso, That if he made a Conveyance of the premises in Fee, or Fee taile, That it should be good, and a revocation of the former uses. And it was found, That he made a Lease for years, and the next day granted the Reversion in Fee, To which the Lessee attorned. Whereupon it was resolved, That although there be not one intire Estate in Fee conveyed; yet both being found, and that it was with an intent to make a Fee to passe, that this was a revocation within the Proviso.

Termino

Termino Trinitatis, anno decimo tertio *Caroli* Regis,
in Banco Regis.

Blague versus Gold. Hill. 12 Car. rot. 752.
Cujus principium pag. 447.

This Case was now argued again by Robert Hide for the Plaintiff, and by Charles Jones for the Defendant; and the Case was recited as before, but only this clause added, which was in the Will (viz.) Upon condition, That the same be new built, according to the Covenants betwixt me and *Bernard Calvert*. And it was found, That this house was the house in Question, and was, at the time of the Will making, in the tenure of Hitchcock, and that the corner house was in the tenure of Willson and Nott; and that the Covenants with *Bernard Calvert* were for the reedifying of the said corner house: *Et si super totam, &c.* And this being now argued, Jones, Berkeley and my self (absente Brampston) delivered our opinions seriatim. That the corner house only passed by the Will, and not the house adjoining, in the tenure of Hitchcock: For although the corner house was not in the tenure of Hitchcock, but a mispziſion, yet the Deſiſe is good; for it is ſufficiently aſcertained before, viz. the corner house in Andover. And the addition in tenura Hitchcock, although it be not in his tenure, and is a miſtake, yet it is but ſurpluſage; and although falſe, ſhall not vitiate the Deſiſe, becauſe the Deſiſe was of a thing certain at the firſt, and ſhall be expounded according as the intent of the parties is apparent; and it is the ſtronger here, by reaſon of the Covenant to reedifie the corner house, and not the other. Vide *Dyer 376. Cottons Caſe, & Dy. 296. 2 Ed. 4. fol. ultimo, Cok. 2. Doddingtons Caſe fol. 32. Plowd. Wrothſley and Adams Caſe.* Wherefore it was adjudged for the Plaintiff.

Evans and Fynches Caſe.

Evans and Fynch were arraigned at the Gaol-delivery of Newgate: For that they, about twelve of the Clock in the forenoon, broke open *Domum mansionalem Hugonis Audeley* in the Inner Temple, no person being in the said house, and stole from thence fourty pounds. And upon the evidence it appeared, That the said Evans, by a Ladder, climbed to the upper window of the said

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Hugh Audley's Chamber, and took out thereof the said forty pounds; and that the said Fynch stood upon the Ladder in the view of the said Evans, and saw Evans in the Chamber, and was assisting and helping to the committing of the said Robbery, and took part of the money. And all this matter being found, it was adjudged, Because the said Fynch did not enter into the Chamber, That he was not within the Statute of tricesimo nono Elizabethæ, which takes away Clergy where an house is broke open, and the Robbery is above the value of 5 s. no person being therein, and that he should have his Clergy, which was allowed him. And as for Evans the speciall Verdict found, That it was in the Chamber of Hugh Audley in the Inner-Temple, And that the Robbery was committed betwixt twelve and one of the Clock in the day time, no person being within the Chamber at the time of the breaking thereof, but that divers persons were in the Inner-Temple Hall and in other places of the house: And whether this be a breaking open the house and taking of Goods above the value of five Shillings, nulla persona being within the house, And within the said Act of tricesimo nono Elizabethæ, They prayed the discretion of the Court: And first it was resolved, That a Chamber of an Inns of Court or Chancery broken open, may be said to be Domus mansionalis of him who is owner of the said Chamber: Whereof at first I doubted, untill I was informed that divers precedents were for Burglary in breaking open such Chambers. Secondly, It was resolved upon this speciall Verdict (being removed by Cerciorari into the Kings Bench, And the Prisoner removed by Habeas Corpus) That this breaking open the Chamber and taking forty pounds out thereof, nulla persona being therein (although there were divers persons in other parts of the house) was within the Statute of tricesimo nono Elizabethæ, which takes away Clergie from such offenders: Whereupon Clergie was denyed unto the said Evans, And Judgement given in the Kings Bench, That he should be hanged.

Ceely *versus* Hopkins and his Wife.

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Action for words. Whereas the *Feme*, dum sola fuit, spake of the Plaintiff these words, He is a Witch and a strong Witch, and hath bewitched me and my Aunt *A. S.* (the Aunt of the said *Feme* innuendo) Therefore I will not marry him. The Defendant pleaded Not guilty, and it was found against her, and damages given to forty pounds. And moved in arrest of Judgement by Germin Serjeant, That these words be not actionable: For to call one Witch generally, is not actionable, as it was adjudged in this Court, nono Caroli, betwixt George and Harvey, and in another Case before betwixt Hawkes and Ange. And for the latter words, It is not said that he did them any bodily harm; And his bewitching, without doing some bodily harm to the Person or Cattel, is not punishable by the Statute of primo Jacobi; so when she is not endangered

indangered by such words, there is no cause of Action at the Common Law. And all the Court held, That for the first words, Thou art a Witch, and a strong Witch, no Action lies, for they be too general. But to say, You have bewitched me and my Aunt, Brampton, Jones, and Berkeley held, That the Action lies; for it shall be intended he bewitched them in their persons: And although it be not shewn, That any bodily wrong or harm was done to them by this Witchcraft, yet it is an offence punishable by the Statute, which doth not mention bodily harm to the person of any, but generally, if he bewitch any person, it shall be an offence punishable by the Statute. But I much doubted thereof, for words shall be alwayes taken in mitiori sensu, and not in an ill sense if they may have any reasonable intendment: And here it may be that he bewitched them with fair words, as the common saying is. And the words subsequent maintain that intent, Therefore I will not marry him. But the other Justices said, That they would not so inteno it. But he ought to have pleaded specially to have extenuated it, if he would have it to be so intended. But they would further advise. Et adjournatur, residuum postea. pag. 480.

Dodson versus Lynne. Trin. 11 Car. rot. 446.

Ejectione firmæ of a Lease of an house and Lands in Mowlesworth, for three years. Upon Not guilty pleaded, and special Verdict, the case was, Edward Lynn the Defendant, being Parson of Mowlesworth, the Land in the Declaration being found to be parcell of the Glebe of the Rectory, and that the said Rectory is a Benefice with Cure, over the value of 8 l. per annum, It was found, That he was Chaplain to the Earl of Salisbury, and obtained Licence from the Archbishop of Canterbury to accept of another Benefice Modo sit infra ten miles of the former, which was contained under the Great Seal. Lynn accepts another Benefice with Cure, which was found to be distant seventeen miles from the first, and was instituted and inducted thereto, both being within the Diocels of Lincoln, And that the Archbishop made his visitation within the Diocels of Lincoln, and inhibited the Bishop of Lincoln to exercise any Jurisdiction during his visitation; And that the Patron omitted to present to the first Benefice within the six moneths, and that the Bishop of Lincoln within the second six moneths collated the Lessee of the Plaintiff to the first Benefice, who was admitted, instituted, and inducted thereto, and made the Lease. And whether the Plaintiff hath good title against the Defendant was the question? The principall doubts herein were, Whether *in modo* was a condition in this Licence, and made the first Benefice void when he took the second? Secondly, Whether the Bishop collating, during the time of the Archbishops visitation, and after his inhibition, were good? And because these questions concerned Ecclesiasticall Jurisdiction, the Court requested to hear Civilians in these points. And

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Doctor Duck and Doctor Eden argued on the part of the Defendant: And Doctor William Lewen for the Plaintiff. And it was moved on the Defendants part, and there were shewn divers Texts in the Civil Law, That modo and dummodo are not exprels Provisores in such Licences, and do not make a condition, unless there be added other words, That if he do otherwise, that then it shall be void, But is only as an admonition or caution, That he shall be punishable by Ecclesiasticall censures, if he doth otherwise: And that this hath been alwaies the exposition upon granting such Licences. And after argument at the Barre all the Court resolved, That this being there the exposition alwaies, after the Statute, although it be generally a condition in the exposition of our Law, as Dummodo, Ita quod, and the like, yet it is now to be expounded as it hath been usually; otherwise great inconveniences would ensue, that multitude of Benefices would be void, and in saple to the King, where they have been quietly enjoyed by the other constrution, after such avoidances pleaded. And therefore they all agreed, That it should not be here taken as a condition to make the first Benefice void by the Statute of 21 H.8. But should be left as it was at the Common Law before the Statute, And that the taking of a second Benefice makes not the first void quoad the Patron, untill deprivation, as it is in Cok. lib. 4. fol. 75. in Hollands Case. And then the second question, Whether the Collation by the Bishop, in the time of the Arch-bishops Translation and after inhibition, will not be materiall: Wherefore it was adjudged for the Defendant.

Baker *versus* Willis and others. Pasch, 11 Car. rot. 46.

5.

Ejectione firmæ upon a Lease for seven years, of a Messuage and Lands in Muriallgrang in the Parish of Belton. Upon Not guilty pleaded, and a speciall Verdict found, the case was, John Beamond and Elizabeth his wife, Tenants in Tayle to them, and the Heirs of their bodies, of the gift of Sir Humphry Foster, Remainder to the right Heirs of the said husband, the said John Beamond having issue betwixt them Franc. Beamond, in 6 Ed. 6. levies a fine *sur cognissance de droit come ceo*, to King Ed. 6. with proclamation. The King anno septimo Regni sui grants those Lands to Francis Earl of Huntington and his Heirs: Afterwards in 2. Septemb. anno 5 & 6. Ph. & Mar. the said John Beamond died, upon the tenth of September the same year Elizabeth enters, and Francis Earl of Huntington, died seized of the Reversion, which descended to Henry Earl of Huntington, who by Indenture betwixt him and the said Eliz. (in 16 Reg. Eliz.) reciting that the said Eliz. held the Tenements in Tayle, of the gift of Sir Humphry Foster, Remainder expectant to the right Heirs of the Earl of Huntington, ratifies, allows, and confirms to the said Eliz. all her Estate, Title, and Interest in the said Tenements, Habendum & Tenendum the said Tenements, to the said Eliz. and the Heirs of the body of her, and

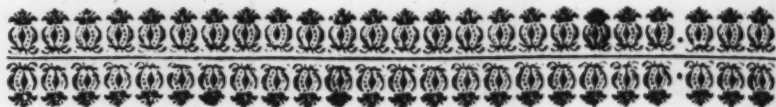
and the said John Beamond ingendred, with Warrant of the said Tenements to the said Eliz. and the Heirs of the body of her, and the said John Beamond engendred, against him and his Heirs. Elizabeth dies anno 29 Eliz. Francis Beamond enters, and hath Issue Sir Henry Beamond, Sir John Beamond, and Francis Beamond, and dies 41 Eliz. Sir Henry Beamond by Indenture covenants to stand seized, to the use of himself and the Heirs males of his body, Rema nder to Sir John Beamond his brother, and the Heirs males of his body, and after ward dies without issue male, his wife *enfeint* with a daughter (afterward called Barbara) the wife of Woolstan Dixy the Lesso: Afterward Sir John Beamond died, and had issue Sir John

who entred and let to the Defendant, and Woolstan Dixy entred in right of his wife, and let to the Plaintiff, prout in the Declaration, who entred; and the Defendant *ousted* him, And whether the Plaintiff hath any Title was the question? And it was divers times argued at the Barr, and now at the Bench by Berkeley, That Judgement ought to be given for the Defendant. First, Because the fine with Proclamations did barr the Estate Tayle, which John Beamond and the Heirs of the body of John Beamond and Elizabeth claimed; for he being barred as Heir of the body of his father, can never claim that Estate; for he is barred by the Acts of Parliament 4 H. 7. & 32 H. 8. and he much insisted upon the validity of fines, that they be perpetuall barrs against the Heir in Tayle of him, who leavies the fine. Secondly, He argued that Eliz. by her entry immediately after the death of her husband, reduced the Estate Tayle back unto her, and it was lawfull and labled unto her by the Statute of 4 H. 7. of Fines, and by the Statute of 32 H. 8. of Discontinuance: And that she was Tenant in Tayle, and not Tenant in Tayle after possibility, as it hath been argued at the Barr, nor in nature of such a Tenancy in Tayle, but an absolute Tenant in Tayle to all purposes. Thirdly, That the Tayle is so barred by the fine, and the Acts of 4 H. 7. & 32 H. 8. that he cannot claim; for he is a person disabled to claim: As a person attainted, although he hath a pardon, cannot claim by descent: And as one presented by Simony to a Benefice, being void, cannot be presented to it again; for he is a person disabled by the Act of Parliament, and by the confirmation to Eliz. nihil operatur unto her, nor to the Heirs of the body of her and John Beamond; Because he in Reversion had but a possibility to have it after the death of John Beamond without issue, and during the time he had issue, he might not claim: And a possibility cannot be transferr'd unto another: And John Beamond who entred shall have it as an occupant; for the Heir generall is barred by the fine, and he in Reversion cannot have it, as long as there is any Heir of the body of John Beamond and Eliz. in esse, and that any who enters shall have it as an Occupant, as in the Case 29. Assise Wherefore he concluded, That Judgement should be given for the Defendant; for he had the priority of possession. But I argued to the contrary, That Judgement ought to be given

for the Plaintiff. First, I agreed, That the fine with Proclamation, was an absolute barr and discharge of the Estate Tayle, against John Beaumont and the Heirs of his body, by the expresse words of the Statute of 32 H. 8. And it is quasi extinct against him by the fine, Vid. Co. lib. 3. fol. 51. Sir George Browns Case, and 5 H. 7. 30. Secondly, I agreed, That when Eliz. entred within the five years after the death of John Beaumont, who levied the fine, she is absolute Tenant in Tayle; for the fine quoad the said Eliz. is absolutely avoided, and she is in, as in her former Estate, which is an absolute Estate Tayle, and no Tayle after possibility of issue extinct; and if she be to sue any reall Action, she is to name her self Tenant in Tayle, Vid. Dy. 331. & 351. Thirdly, That notwithstanding the Estate Tayle is barred by the fine, yet by this confirmation, being by Indenture, it hath revived the Estate Tayle; For although he in Reversion, by reason of the fine, may enter, and have the Land, and the issue after the death of the wife is barred, to claim it; yet by this confirmation he in Reversion hath excluded himself against his confirmation, to claim it; For he may exclude himself of his Estate; and as he may avoid, so he may confirm, Vid. Coke lib. 1. Anne Mayors Case, 11 H. 7. 28. N. B. 98. where Tenant in ancient Demeasns levies a fine, &c. And although at the time of the confirmation, he had nothing to confirm, and his words of confirmation will not add to the Estate of the wife, who had an Estate Tayle; yet by the words Habendum the Tenements, there is a new Estate Tayle extracted out of the Reversion, and settled in Eliz. so as that confirmation is quasi perficiens & crescens, and as the case in Litt. Feme Tenant for life, takes an husband, a confirmation to the husband and wife, Habendum the Land to them, increaseth the Estate to the husband, Coke lib. 9. 161. And whereas it was held, That she had as great an Estate before, as she had by the confirmation, and therefore the confirmation was void. I held, That although she had an Estate Tayle, yet she takes by the confirmation; for a deed shall never be void, when by any intendment it may be allowed to be good, and to have any operation: And she takes it for the benefit of the Heirs of her and her husbands body; and although the Heir be barred by the fine, yet he is restored to the Estate Tayle by the confirmation; for as the fine was an Estoppel to the Heir to claim against the fine; so the Indenture of confirmation is an Estoppel to him in Reversion, to say that he shall not hold it in Tayle, and there it is an Estoppel against an Estoppel which sets the matter at large, as it is Cok. Lit. 352. 12 H. 7. 4. And although it was said by my brother Berkeley, That the Earl of Huntington hath but a possibility to have it after the death of Eliz. and that he hath it but as an Occupant, to have and enjoy it during the time that John Beaumont had issue of the said Eliz. I utterly denied, That he hath but a possibility; for he hath it as in right of his Reversion, if his confirmation had not barred him, and that appears by Austins case in Plowdens Commentaries, and in 38 & 39 Eliz.

Eliz. Hulleys Case, where an Estate is barred, or discharged, or
ertina, as Sir George Browns Case, Cok. lib. 3. fol. 50. terms it,
Where he in Reversion shall have it, as in point of Reversion, and
if he hath but a possibility, yet that may be well transferr'd by con-
firmation or release, to him who hath the possession of the Land,
as it is resolved Cok. lib. 4. fol. 64. Fulwoods Case, and lib.
10. fol. 46. Lampets Case, And as it is holden Cok. lib. 1. Corbets
Case, That there is no Condition, Probiso, or any other title,
but may by apt words be determined, the one way or the other;
so here every party agreeing, the Estate Caple shall be revived, or
at leastwise newly created, and the Law shall adjudge it accor-
ding to their interest: And therefore I was of opinion, That
Judgement should be given for the Plaintiff. But Jones and
Brampton chief Justice deferred their arguments that day, hear-
ing that the parties were about agreement: And afterward by
our means they compounded, and Sir John Beaumont agreed to pay
5000 l. and the others agreed to assure the Estate by fine, or other-
wise, &c. Et sic materia prædicta sopita fuit, and no Judgement
given. But Jones told me, That he was cleer of opinion, That
the Plaintiff had good title, and that the confirmation was good,
and created a good Estate in Eliz. descendable to her Heirs.

Termio



Termino Michaelis, anno decimo tertio *Caroli* Regis,
in Banco Regis.

Ceely versus Hopkins. Quod vide ante pag. 474.

1. **W**As now moved again by Germin Serjeant, and pressed to have Judgement. And all the Court resolved; for as much as the words are, Bewitched me and my Aunt, and he is found guilty of malicious speaking of them, it shall be intended and conceived, to be spoken according to the common sense of bewitching their persons, and not of bewitching with fair words; Whereupon Judgement was given for the Plaintiff.

Anonymus. Hill, 12 Car. rot. 618.

2. **E**Rror to reverse a Judgement in Replevin. The Error assigned by Grimston, was in the mis-triall of the Issue, because the Issue being, Whether Lands in Bromley were held of the Manor of Webbs by such services, The Venire facias was awarded de vicineto de Bromley, where it ought to be de vicineto of the Manor, Or de Vicineto de Bromley and of the Manor? And all the Court (Brampston absent) held, That the Tryall by the Common Law ought to have been per vicinetum of both: And that such a mis-triall had been cause of reversall, &c. But by the Statute of 21 Jac. cap. it is aided, which appoints, that if a Trial is to be of severall places, it shall be tryed per vicinetum of any of the places, and it is well enough.

Seaman versus Bigg. Trin: 13 Car. rot. 1009.

3. **A**Ction for Words. Whereas the Plaintiff was Servant in Husbandry to J. S. and was his Bayliff, and in great trust with him, and thereby got his means and maintenance. That the Defendant to disgrace and discredit him with his Master and others, spake of him these words, Thou art a cozening Knave, and haste cozened thy Master (innuendo the said J. S.) of a bushell of Barley: The Defendant makes justification, and found against him: And now Farrer moved in arrest of Judgement, That these words



words be not actionable; For no Action lies for calling one cozening knave or cheating knave. But all the Court (Brampton being absent) held, That true it is, generally an Action will not lye for calling one cozening knave; yet where they be spoken of one who is a servant and accomptant, and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is deprived of his livelyhood and means of maintenance, there is good reason it should bear an Action, that he might have recompence for loss of his credit and means, &c. Wherefore it was adjudged for the Plaintiff.

South and others, Bayl for Jefferson, at the Suit of Gryffith.
Hill. 12 Car. rot. 559.

ERror of a Judgment in the Common Bench, brought by the Bayle; And the Writ suppoeth, That the Error was in the principal Judgment: And also in the Judgment upon the Scire facias against the Bayl. Et in redditione Executionis superinde. And the Error was assigned in the Execution against the Bayl, That no Capias was awarded against the principal. And Jones said, It was a question stirred in the Common Bench, Whether an Execution might be in the Common Bench against the Bayl, where no Capias issued against the principal? And Hobert chief Justice, was of opinion, That it might, Because the Recognisance by the Bayl in the Common Bench differs from the course of the Bayl in the Kings Bench: For there the Recognisance is in a sum certain, That the principal shall render his body. But all the other Justices there held, That it is all one in the Common Bench and in the Kings Bench, That a Capias against the principal ought to be taken forth, and returned Non est inventus, Otherwise no Scire facias ought to be against the Bayl: For if the principal be taken by the Capias, or that he render himself to Prison upon the Judgment, Then no execution ought to be against the Bayl. And of this opinion was all the Court here. Then it was moved, That this Writ of Error was ill, Because the Writ of Error is brought by the Bayl for Error in the principal Judgment, which the Bayl cannot have. And thereto the Court agreed, That the Bayl cannot assign Error in the principal Judgment, nor can take advantage of any Error therein. And they further held, That if the Writ of Error had been brought for Error only in the principal Judgment, it had been clearly ill: But because the Writ of Error suppoeth Error in the principal Judgment, and also in the Judgment upon the Scire facias against the Bayl, as also in redditione Executionis superinde, Jones held, That the Writ of Error will lye for that part, and shall be void for the residue. But Berkeley and my self (Brampton being absent) were of opinion, That the Writ was ill, and should abate in all, Because it is grounded upon the first Judgment, and also upon the Judgment in the Scire facias; and

so coupling them together, all is void : But if the Bayl in their Writ of Error had recited the first Judgment (as of necessity they must make mention thereof) and the second Judgment in the Scire facias, and alledged Error in that Judgment and in the execution thereof, &c. it had been well enough.

Sacheverill *versus* Porter, Trin. 11 Car. rot. 324.

5. **T** Respals, quare clausum fregit, & cum Averii depasc. &c. Upon a special Verdict, the Case was, That one Fulk of Peterborough, and others, were seized in Fee of the place where, being a great Waste called Atterhall-heath; and being so seized anno secundo Henrici quarti, granted by Deed indented, to the Prior and Convent of Stone, (who were seized in Fee of three Villages, one hundred acres of Land, thirty acres of Meadow, and fifty acres of Pasture in Stallington) common for him, & omnibus tenentibus suis in Stallington pro omnibus averiis suis communicabilibus omni tempore anni in prædicto vasto. Habendum the said Common of Pasture to the said Prior and Convent, & Successoribus & tenentibus suis in perpetuum. The Priory being dissolved, the King grants the said Tenements, with all Commons to them appertaining and therewith enjoyed, to Rowland Hill and his Heirs; who by Feoffment conveys three and thirty acres, parcel of those Tenements cum pertinentiis, to the Defendant; who therefore justifies the using of the said Common appurtenant. The first question was, Whether Common created secundo Henrici quarti, and so within time of memory, granted to the Prior and Tenants, &c. may be said Common appurtenant to the said Tenements in Stallington? Resolved, That it may. For being granted to him and his Tenants of Stallington, it is Common appurtenant, and may pass by Feoffment as Common appurtenant, together with the said Tenements. Secondly, Although but part of the Land is conveyed, and not the intire, yet it is Common appurtenant, as common for the Beasts ledant and couchant upon the said Tenements, and well shall pass with them by the words cum pertinentiis. And although it be Common created within time of memory, it is Common appurtenant, and may be well apportioned. Vide Co. lib. 8. 78. Weilds Case. Thirdly, Although the pleading and Verdict is, That Feoffment was of part of the said Lands, and doth not say, that it was by Deed, yet it is good enough: Therefore it was adjudged for the Defendant. Vid. 36. Ass. 3. 15. Ass. 11.

The Case of the Lady Fulwood, and others.

6. **T**he Lady Fulwood, Roger Fulwood, Richard Bowen, and divers others (not Prisoners, but at large) were endicted in the County of Surrey, That whereas Sarah Cock was a Maid, who had

had a portion of 1300l. The said Roger Fulwood, by the procurement and abetting of the said Lady Fulwood, at the Parish of St. Saviours, violently, and with force, and against the will of the said Sarah, took and carried the said Sarah to Saint Saviours, and there married her, by the aid and procurement of the said other persons, against the form of the Statute in that case provided. And upon this Endicment they being arraigned, pleaded Not guilty, and put themselves upon the Country. And the said Roger Fulwood, Richard Bowen, and one John Hoxton a Coachman, were endicted in the County of Middlesex, de eo quod the said Sarah being a person having a portion of 1300 l. for lucre of the gain of the said portion, they took her at Newington in the County of Middlesex against her will, and carried her to St. Saviours in the County of Surrey, and there the said Roger Fulwood, by the aid, abetment, and procurement of the said Bowen and others, married the said Sarah in the said Parish of St. Saviours in the County of Surrey, against the form of the Statute in that case provided. And upon this the said Fulwood, Bowen, and the Coachman were arraigned, And prayed counsel to be assigned them, to be advised what they should plead for matter in Law: For it was pretended, That this taking in one County and marrying in another County, was not tryable in the County of Surrey: And thereupon Holbourn and Serjeant Henden were assigned of counsel with them. And they alledged, That in the Case of one Bruton, it was resolved upon a reference out of the Star Chamber by all the Justices, That the taking away of a woman, unless she be married or defiled, is not felony within the Statute: And hereupon the Counsel prayed, That they might have a copie of the Endicments: And it was allowed by the Court, That they should have a copie of the Endicment in Middlesex, but not of the Endicment in Surry. Residium postea pag. 484, 488, 492.

Sir John Fitzherbert *versus* Sir Edward Fitzherbert, and others.

Ejectione firmæ. Upon evidence to the Jury, it was resolved by 7. all the Court, Whereas Sir Thomas Fitzherbert and Sir John Fitzherbert his brother, being Tenants for life, the one in Remainder after the other, the Remainder in tail to Thomas Fitzherbert their Nephew, upon purpose to barre this intail, the 1. Octob. 25 Eliz. made a lease for years, with agreement, That the Lessee should make a Feoffment of this Land, who accordingly the twelfth of October made the Feoffment; And afterward, on the seventeenth of October, Sir Thomas Fitzherbert released to the Feoffee with Warranty, and on the nineteenth of October, Sir John Fitzherbert released to the Feoffee with Warranty, and both these Warranties descended upon Thomas Fitzherbert in Remainder; Resolved, That these Warranties were Warranties commencing by disseisin, although

although they were created seven dayes after the Feoffment: For the Feoffment was made by Cobin, and with an intent and agreement precedent, That there should be such a Feoffment and Releases made after, and they be all but as one Act, grounded upon this fraud and practice and shall not bind him in Remainder. Secondly, It was moved, If Thomas, after this Disseisin, not knowing of the Disseisin, had levied a fine to a Stranger, Whether that should have barred his right, and enured to the benefit of the Disseisor, according to Cok. Lib. 2. foll. 55. Bucklers Case, which, if admitted, would be of a very mischievous consequence? But herein the Court delivered no opinion. But Brampton and my self conceived, That it should not enure to the benefit of the Disseisor, but to the use of the Conusor himself; For otherwise a disseisin being secret, may be the cause of disinherision of any one who intends to levy a fine for his own benefit, for assurance of his Lands upon his wife and children, or otherwise.

Moulin versus Sir George Dallison.

8. **T**he question being, Whether the manner of Sherfield was by custome descendable to the eldest daughter? The Plaintiff, to prove this custome, shewed, That it was parcell of the Manor of Odiham, which is ancient Demeasne: In which Manor the custome is, That Lands are descendable to the eldest daughter. But on the other part was shewn, That it cannot be parcell of the Manor of Odiham, because it appears by divers Records, That this Manor of Sherfield was held of the King by Grand Serjeantie: And although it was agreed on both parts, That there is such a custome within the Manor and Vill of Odiham; yet for as much as the Manor of Sherfield holds by such service, It cannot be parcell of the Manor of Odiham. But to that was answered, That this Tenure in Grand Serjeantie was created by King Edward the second; And if there were such an ancient custome, it cannot be destroyed nor altered by alteration of the Tenure; which was agreed by all the Justices. Whereupon, because divers presidents were shewn, That Lands of the Freeholders used to descend there to the eldest daughter, And Lands in Sherfield used to be recovered by a Writ of Right close, in the Court there, it was left to the Jury to inquire, Whether there were any such custome? And because the Jurors, lying all night, could not agree, a Juror by consent was drawn.

The Case of Fulwood. Ante pag. 482.

9. **T**he Presidents of the Court were searched, and one president was shewen Pasc. 31 H. 8. rot. 14 inter placita Regis, Where Henry Sturges and Philip Sturges were indicted for the taking of one Agnes Hobson against her will, who was the daughter

daughter and Heir of John Hobson, who was seized of Lands to the value of 20 l. per annum: And they pleaded to the Endictment, That they ought not to answer, pro eo quod non mentionatur in the said Endictment, quod ceperunt ad intentionem maritandi prædictam *Agnetem* vel ad prostituendam, &c. and they were discharged. Another Record was shewn, Hil. 3 & 4 Ph. & Mar. rot. 10. Roger Thompson and Peter Rewley were endicted pro eo quod felonice ceperunt *Margaretam Burton & Margeriam Burton*, daughters and coheirs of one Roger Burton deceased, and against their wills, &c. And they pleaded, They ought not to answer to the said Endictment, pro eo quod non apparet in quo loco nec quomodo they took the said daughters, & pro eo quod non mentionatur in dicto Endictamento, That the said Roger or Peter married or defiled the said Margaret or Margery, *ils alers sans jour*. Note that in the Lord Hobarts Book he sets down, That one Bruton exhibited his Bill in the Star Chamber against Edm. Morrice, for stealing away his daughter, he being seized of Lands, and having Goods to the value of 5000 l. and she was not his Heir, for he had a Son: And she was inticed away by friendship, and then by force carried into Suff and there married, And whether this were within the Statute of 3 H. 7. cap. 2. was referred to the two chief Justices, and to have the opinion of the other Justices? And they all upon perusal of the Statute and view of presidents, resolved, That it was not within the Statute; for although they held, That the party being first taken away with her own consent, and after by force carryed into Suffolk (from which time the forcible taking began) was forcible taking away within the intent of this Act: And although the words in the purview seem to be general, and to extend to all women unlawfully taken against their wills, yet considering that the preamble of the Statute cannot be conceived to be idle, but must be intended to restrain the purview to the particular cases in the preamble mentioned, That is to say, that they shall be *Maids, Widows or Wives*, their substance in Lands or Goods, or otherwise Heirs apparent, that the motive be lucre, and the end to be married or defiled: And the purview, That what person or persons should steal away a woman so against her will unlawfully, &c. It was conceived, That this word so did imply, and bind up the preamble to the purview, otherwise the word so were idle and might have been spared, if it did not declare the motives and the ends of the Action, which in this case are lucre and luxuriousness: Presidents were shewn Pasch. 9. H. 7. An Endictment against Hylord and others, Hill. 3 & 4. Ph. & Mar. against Polley, wherein no mention is made, That they were intitled to Lands or Goods, or that they were Heirs apparent. But there were seven or eight presidents shewn, wherein it was mentioned: And that in the Lord Anderfons Reports, 1 Hill. 16 Eliz. it was agreed by the Justices, that if a woman be taken against her will and enforced to contract her self in marriage, yet
is not

is not married, it is no felony; But if she be married or defiled, it is felony. And there it was said, That if the taking of such a woman and the marrying or defiling be in several Countries, it is felony compounded of all the three parts, as stroke, and death are but one murder Residuum postea pag. 448. 492.

Sydnam and Parrs Case. Mich. 13 Car. Rot. Surrey.

10. **S**YDNAM and Parr were brought to the Bar by Habeas Corpus: Wherein was returned, That they were committed to Goal; by one Read Justice of Peace of the said County, by force of the Statute of 15 R. 2. upon complaint of one J. S. That he claimed Common in a Meadow of the said Sydnams, called Monks Meadow: And that the said Sydnam and Parr entered into the said Meadow, and kept him out from his Common with force and arms; Wherefore he was prayed to view the force, and that he came thither and found them holding the said Meadow with force; whereupon he by vertue of the said Statute committed them to Goal. Upon the motion of Grimston, and reading the return, all the Court (Brampston being absent) held, This commitment was not warranted by that Statute; for although one may be disseized of a Rent or Common by force, which is inquirable in Assises, and punishable if it be found: yet one may not be endited or committed for entering his own Land with force, or holding his own Land with force, against a Commoner; for it ought to be ubi ingressus non datur per legem, And one in his own Land may enter lawfully, and may detain with force against any who pretend to have Common there, he being allowed to be owner of the Soyle: And this Statute is not to be extended against any, but him who enters unlawfully, and ousts another of his lawfull possession; Wherefore the cause of committing and detaining them in prison, was held unlawfull, and the prisoners were discharged.

Bower and his Wife *versus* Cooper.

11. **A**ction upon the case in London for words of the *Feme*, Thou art an Whore, and a two penny Whore. Upon an Habeas Corpus this cause being removed, I signed a Procedendo; Because I was informed it is good cause of Action in London by the Custom, (for they ought to punish such persons there with Carting and Whipping) and that it lies not in this Court. And now Pheasant moved to have a Superedeas, and the cause removed; for he said it was against Law to suffer such Actions to be prosecuted in London, upon pretence of a Custom, where they are not maintainable

tainable in the Superior Courts : And that for calling one Whore or Adulterer and the like, an Action lies not at the Common Law, Vid. Register 54. Cok. lib. 4. Murfords Case, Where for these words it was held an Action lies not : But Stone prayed, That no Superseas might be granted ; for he said an Action lies in London for these words by the Custom ; Because an Whore there is to suffer corporal punishment, viz. Carting and Whipping : And it is an offence presentable at the Wardmotes-Inquest, and there punishable ; so being subject to a corporal punishment, It is reason she should have her Action there. And if the party conceives himself grieved, he may have a Writ of Error ; And if against Law, may reverse it : And cited Trin. 8. Car. Such a cause being removed by Habeas Corpus, A Procedendo was awarded in this Court upon debate. And so all the Court held here, except Berkeley ; who conceived, That a Superseas ought to be granted. And it was alledged by Stone, That by the Statute of 21 Jac. after a Procedendo is granted, no Superseas ought to be awarded. But the whole Court was against him in that point : For when a Procedendo unduly vel improvide emanavit, the use is to grant a Superseas. But here it was conceived by Jones, Bramston, and myself, That the Procedendo was well awarded ; therefore we denied to grant a Superseas.

Kinnion *versus* Davies. Trin. 12 Caroli, rot. 1c 96.

ERror of a Judgment in the Common Bench, in an Action upon the Case, Pro eo quod the Defendant, Quendam Canem ad mordendum Oves consuetum apud Hindon scienter retinuit & custodivit ; qui quidam Canis, such a day and place one hundred Sheep of the Plaintiffs ibidem inventos tam graviter momordit, quod twenty of them dyed of the said biting, and the others were much hurt. Judgment being given there by default, the Error assigned by Grimston was, That the Declaration was not good : For he doth not shew, according to the usual course, Quod sciens Canem prædictum ad mordendum Oves consuetum scienter retinuit, For it may be, that he Scienter retinuit Canem ; and yet knew not that he was consuetum ad mordendum Oves, which is the main point of the Action : And upon reading the Declaration, all the Court held (absente Bramston) that it was not good ; Whereupon Rule was given, that the Judgment should be reversed, unless, &c.

12.

The

The Case of Fulwood. Ante pag. 482, 484.

13. **R**Oger Fulwood, Richard Bowen, and the Lady Fulwood were indicted by a Jury of Surrey, wherein was supposed, That the said Roger Fulwood, Richard Bowen, the Lady Fulwood, and others, upon the twenty third of August, anno Caroli, at Southwark in the County of Surrey, violenter & felonice assaulted one Sarah Coxe, and her, there, took away by force and against her will; and the said Roger Fulwood, the 23. of August the same year at Southwark, married her, the said Sarah Coxe, by the abetment and procurement of the said Bowen and the Lady Fulwood. Upon this Indictment, being arraigned, they pleaded Not guilty, and now by a Jury of the County of Surrey, they were tried, and upon Evidence it appeared, That the said Sarah being an Orphan, and having 1200 l. for her Portion, was by force, with Swords drawn at Illington in the County of Middlesex, taken away against her will, by the said Roger Fulwood and Richard Bowen at eight of the clock at night, and put into a Coach with the said Roger Fulwood, and brought to the Strand-bridge, and from thence carried by water unto the Bishop of Winchester's house; and the next day being the 23. of August, upon pretence of shewing her the house, brought into the Chappel, and being there much in fear (as she pretended and gave in Evidence) was married to the said Roger Fulwood, in the presence of the said Lady Fulwood his Mother, and of the said Richard Bowen and divers others: And Roger Fulwood brought divers Witnesses to prove she was willing to marry him; and that she being asked the question before by him, whether she were willing to marry him? answered, That she was willing, and appointed a Chaplain to make her a Cowen, and was found in bed with him; but she pretended it was by reason of his threats, and when she was in such fear as she knew not what she did. And hereupon Holbourn, who was assigned of Counsel for the Prisoners, moved, That for as much as the force was in Middlesex, and no force is proved in Surrey, That the Jury ought not to find them guilty in Surrey. But all the Court (Berkley absent) delivered their opinions seriatim, That if the Jury found, That she was taken with force in Middlesex, and carried in a Coach unto Strand-bridge, and brought by them into Surrey; it is a continuing force, and a forcible caption in Surrey, and an offence within the Statute. Secondly, Whereas it was alledged by Holbourn, That it was not a Marriage; (For she affirmed upon her oath in her examination, and now viva voce, That she knew not what she did;) yet all the Court held (although this might avoid the Marriage) That it is such a Marriage, as is an offence within the Statute. But for the Lady Fulwood, because it appears not she was party to the forcible taking or consenting thereto, it was not an offence

fence in her within the Statute; Wherefore the Jury found Roger Fulwood and Bowen guilty, and the Lady Fulwood not guilty. And Holbourn, being assigned of Counsel as aforesaid for matters in Law, arising upon the Evidence, or otherwise, after Verdict, moved in arrest of Judgment, That the Endicement was not good. First, Because it is not expressed in the Endicement, That the taking was, *Ea intentione*, that the said Roger Fulwood would marry or defile the said Sarah, which is the Exception in 31 Hen. 8. for which that Endicement was discharged. Secondly, That whereas divers were endicted, the Endicement was *cepit*, whereas it ought to have been *ceperunt*. but all the Court (*absente Berkeley*) resolved, that this was not any cause of Exception; For in regard it appears apparently by the Endicement, that they took her, & abduxerunt for lucre, and the same day married her, the said Sarah, that shews the caption to be with an intent to marry her; also there be no such words in the Statute *Ea intentione*, the offence being by reason of the caption against her will. And I delivered my opinion to be, that if one takes such a Ward forcibly and against her will, with an intent to marry her, it is Felony, although Marriage or defiling doth not follow thereupon: but Jones said, that it hath been resolved, and was so reported by Dalison, that forcible taking away against her will, if marriage or defilement did not ensue, was no Felony. Brampton doubted thereof. *Residuum posita*, pag. 492.

Wilner versus Hold.

Action for these words, Thou art a Rogue and a Rascal, and hast killed thy Wife (*quandam Elizabetham nuper uxorem le Plaintiff innuendo.*) After Not guilty pleaded, and found for the Plaintiff, and damages 20. marks, Atkins and Trevor moved in arrest of Judgment, that no Action lies for these words: for the words of Rogue and Rascal are but words of heat, for which no Action lies; And thereto the whole Court agreed. Secondly, It lies not for the words, Thou hast killed thy Wife, because it is not shewn, that his Wife is dead, nor how she was killed, nor that she was violently killed or murdered; and although the Declaration is nuper his Wife: Yet that doth not prove that his Wife was dead; for it may be they were divorced. *Sed non allocatur*; For when it is said nuper his Wife, it shall be intended she is dead, and not have such a forrain construction, That she was divorced. And the Court further held, that the words, Thou hast killed thy Wife, shall be intended according to the usual speaking, that he killed her voluntarily: and whatsoever way he killed her, the words be very scandalous; Wherefore it was adjudged, that the Action lies.

Kniveton *versus* Latham.

15. **D**Ebt, by Daniel Kniveton, Francis Kniveton, and William Kniveton, Executors of John Kniveton, upon an Obligation made to their Testator of 100 l. anno 9 Car. upon condition to pay 52 l. The Defendant demands Oyer of the Condition, which being entred, he pleads, That he paid the 52 l. to Francis, one of the Executors, in satisfaction of the said debt, and all interests and damages for it: And thereupon the said Francis released unto him the said Obligation. The Plaintiff replies, That the said Francis was within age at the time of the release, viz. of the age of 18. years: and upon this it was demurred: And now Alestre for the Defendant shewed the cause of demurrer to be, because he doth not deny the payment of the principal interest and damages: And although the Bond was forfeited rigore juris, yet acceptance is good cause of his making the release, and he is not to take advantage of the forfeiture of the Bond; and although he be an Infant, yet being above the age of 17. years, who may take upon him to be Executor, his release as Executor is good, and shall bind him and his Co-executors: But Rolls for the Plaintiff argued, that this release, being by an Infant, is void; for the Bond being forfeited, the intire 100 l. is due, and acceptance of part of a sum, viz. 52 l. cannot be taken as satisfaction: and this release shall not prejudice him, being an Infant; for he hath loss thereby, and is in danger of a Devastavit. And of this opinion were Jones and Berkeley. That a Release by an Infant, although he be Executor, without receipt of the intire debt, is not good, nor shall bind him: For although it is against conscience, that he should take the forfeiture of the Bond, yet he may, if he will. And Berkeley held, that this giving a discharge of the intire Bond, shall be a Devastavit, by which the Infant being to receive prejudice, that Deed shall not bind him. But I held, that for as much as he did it only as Executor, and according to good conscience, and none denies, but that there was payment made of the principal debt, there is good cause this Release should bind him; and that it should not be a Devastavit, because he did that which he was compellable to do in a Court of Conscience. Vid. Cok. lib. 5. fol. 27. Russels Case 16. Hen. 6. Release 45. 21 Ed. 4. 29. And afterwards, this Term, being again moved by Rolls for the Plaintiff, Brampton agreed with Jones and Berkeley, That this Release by an Infant shall not barr, because the Infant being Executor, by course of Law is to have the benefit of the forfeiture of the Bond, and the intire sum in the Bond is a Debt due to the Executor; and when the Infant, being but one of the Executors, takes part of the money only (although it be all which was due in conscience) yet this Release shall not barr him; but

ing full, resolved, That Judgment should be given. Justice Jones pronounced it, and said, That although it had been objected, and was disbulged, That it was an obsolete Statute, and it would be hard, if any should be condemned thereupon; he thereto answered, That they were deceived; for it is a good Statute and in use, but many had not been executed thereupon, because they had their Clergie, for the taking whereof away, the Statute of 39 Eliz. cap. 8. was made, and some have been since hanged; and within these ten years one Thorold was indicted and arraigned at Newgate upon this Statute, for the taking of Mistris Havers, an Orphan, against her will, and marrying her; but he obtained his pardon, and avoided the conviction by this means. And whereas it is here pretended, That Sarah was married with her consent, and therefore not within the Statute, he said (and we all consented thereto) That the taking being unlawful and against her will, although the marriage was with her will, yet it is felony within the Statute: And they all held, although this was not a Marriage de jure, because she was in such fear (as she affirmed upon her oath) That she knew not what she answered or did; yet it is a Marriage de facto, and is felony within this Statute; Therefore Judgment was given, That they should be hanged.

Termينو Hillarii, anno decimo tertio Caroli Regis,
in Banco Regis.

Kellend *versus* Whyte. Trin. 13 Car. rot. 1626.

1. **E**jectione firmæ of a Lease made by John Arundell to the Plaintiff. The Defendant pleaded, That long time before the Lessor had any thing to do, I. W. Grandfather of the Defendant, was seized in fee of that Land, holden in Socage, And devised it to T. W. his son (the Defendants father) in tail; who entred, and died seized; which descended to the Defendant; Whereupon he entred and was seized in tail, until the said John Arundell entred upon him and disseised him, and let to the Plaintiff. The Plaintiff confesseth the seisin of J. W. and the devise in tail. But pleads a fine with proclamation to bar this entail, and conveys title to the Lessor of the Plaintiff. And upon this Plea the Defendant demurred. And Maynard shewed the cause to be because the disseisin is the material part of the barr, and the intail is but an inducement thereto; and therefore he ought to confess and avoid the disseisin alledged, or traverse it. But Rolls, for the Plaintiff, maintained the Replication, because it conveys an especial Estate to the Defendant, and a descent thereby, And it sufficeth to avoid that entail alledged. And in proof thereof, he relied upon Heliars Case, Co. lib. 6. fol. 24. But all the Court (absente Brampton) held, That this Replication is vitious; For it is but argumentative, and is no expresse confession and avoidance, and it ought to answer the material part of the barr, which is the Disseisin; And he ought not answer unto it by argument: And it is not like Heliars Case; for there both claimed the same Term, which cannot be gained by any, unless by Grant, and there entitling himself by a former Grant from the same person, by whom the Defendant claims, It is a good confession and avoidance of the last assignment: Whereupon it was here adjudged for the Defendant.

Perry *versus* Diggs. Trin. 13 Car. rot. 402.

2. **E**rror of a Judgment given at Marlborow. Where the Plaintiff declared in an Action upon Trover against Baron and Feme, That they converted ad usum ipsorum; and, after Verdict, upon Not guilty pleaded, and Judgment for the Plaintiff, the Error here assigned was, that the Declaration was not good; because a Feme

Covars

but if he will take all the money, and make a Release, then it is good; And if the Defendant would have remedy, he is to have it in a Court of Equity, and cannot plead this Release in barr at the Common Law; Whereupon Rule was given that Judgment should be entred for the Plaintiff, unless other cause were shewn upon the Thursday following. And afterward, this Case being moved at the Table in Serjeants Inn Fleetstreet, Dampport chief Baron and Baron Denham agreed, That this Release, without payment of the intire sum, contained in the Bond (it being forfeited) was not any barr to the Infant: But Brampton chief Justice and Dampport chief Baron agreed, That such Release, by an Executor of full age, upon receipt of the principal money and the Interest, shall be only *Affect* for the interest and money received, and shall not be a Devastavit for the residue, because he did that which in good conscience he ought to do.

The King *versus* Rooks.

SCire facias being sued in Chancery against Thomas Rooks, to ¹⁶
 shew cause wherefore his Patent of the Office of Searcher of the Port of Sandwich cum membris, granted unto him for life, should not be seized as forfeited, because by enquisition upon a Commission issued out of the Chancery, it was found, That divers misdemeanors were committed by him, to the great prejudice of the King, and forfeiture of his Office. Upon this the Defendant appeared there, and traversed the points found in the Enquisition; and thereupon twenty six Issues were joyned, upon so many several points found in the Office, some of them being triable in Kent, other some triable by a Jury of Midd. Upon this, the Record being delivered by the Lord Keeper with his own hands, evidence was given at the Bar to a Kentish Jury upon seventeen of these Issues, whereof one of them was meerly for his absence from executing his Office from the tenth of June 10 Car. unto the twelfth of August following. Unto this, the Defendant pleaded, That he was sick all the said time, and Issue being joyned thereupon, he failed in proof thereof: The proof on the part of the Plaintiff was, That he was well in health at London at that time: This Issue was found for the Plaintiff, and to three other several times of his absence found in the Enquisition, he pleaded, That he was in Prison, and in execution at the Kings Suit, by command out of the Exchequer: And upon these three Issues, because some doubt was conceived, for as much as the Imprisonment was at the Kings Suit, Whether that should not excuse him for his absence, in regard of the necessity, he being committed for debt to the King, and misdemeanor in his Office. To avoid therefore the Question (there being many other causes of forfeiture of his Office) it was concei-

ved the King should not give evidence for them. Two other several Issues were, Whether he voluntarily suffered a Ship, laden with several commodities (naming them) to be exported, and other Ships to be imported and unladen, without being searched? And upon the Evidence it appeared, That such a Ship was imported and unladen, and others also were exported beyond Seas, not being searched: But these were so imported and exported, when neither himself or any of his Deputies were there: So it appears not whether it was by negligence or voluntarily; For he did not know of them, and so not within that Issue. But all the Court held, That this voluntary absence and neglect, so as neither himself nor Servants were there to search, is not only Crassa negligentia, but a voluntary permission; As if a Goalor should leave his Prison doors unlocked, and the Prisoners escape, it is not only a negligent, but a voluntary escape: So here, &c. Whereupon the Jury found this Issue against the Defendant. Another cause of forfeiture of the said Office was in issue, viz. That he seized divers goods forfeited, for not being customed, and accounted not for them to the King, but converted them to his proper use. To this he pleaded, That he seized them, and was ready to account, and traverseth the Conversion: And upon the Evidence it appeared, That he seized them as forfeited, and never tenderd to account, nor brought them into the Exchequer, nor signified in the Exchequer what they were (as he ought to have done) but he himself sold them at London, which was a cleer Conversion; Whereupon this Issue was also found against him.

Herbert *versus* Laughluyn, Pasch. 12 Car. rot. 388.

17. **E**Rror of a Judgment in the Kings Bench in Ireland, in an Ejectione firmæ. The principal Error insisted upon, was, That this Ejectione firmæ is brought de piscaria in such a River. And because it was not terra, aqua cooperta, nor of any land, but only of a profit apprender, all the Court (absente Brampton chief Justice) held, That an Ejectione firmæ lies not thereof, no more than of common apprender or rent; Wherefore for this Error the Judgment was reversed. But Jones said, That peradventure an Assise would lie of such a Piscarie, because it is proficuum in certo loco capiend. But he cannot maintain an Ejectione firmæ.

The Case of Fulwood & Bowen. Cujus principium ante pag. 482, 484, 488.

18. **T**hey being brought to the Barr, and demanded what they could say, why Judgment should not be given against them, answered, That they had not any more to say. And the Court, being

Covert, with her *Baron*, cannot convert to the use of the *Feme*, but all is done to the use of the *Baron* : Wherefore for this cause it was reversed.

Reeve *versus* Digby. Trin. 13 Car. rot. 303.

ERROR of a Judgment in the Common Bench, in an Action upon the Case, for the disturbance of using his Common in a certain place called The Lakes, and shews the prescription of Common, And the disturbance by digging 40000. Turfs, and making of a Fish-pond. The Defendant pleaded, That he was Lord of the Manor, and improved the said several parcels, according to the Statute, leaving sufficient Common in the residue. Issue being thereupon, the Jury found, quoad the parcel where the digging of the 40000. Turfs was, That the Defendant had not left to the Plaintiff sufficient Common, and assessed damages five shillings and costs. And quoad the digging of the Fish pond, That the Defendant had left unto him sufficient Common. And upon this Verdict Judgment was given for the Plaintiff for the first, which is directly found against the Defendant : And for the other part, for digging of the Fish pond, Judgment was for the Defendant, and the Plaintiff in misericordia : And hereupon the Error assigned was, That this Verdict was repugnant, to find that he had not sufficiency of Common, and that he had sufficiency of Common : Wherefore the first finding for the Plaintiff is good; and the finding of the second, which is repugnant, is void. And the Judgment being for the Defendant for part, is erroneous. And of that opinion was Berkeley, because it is one intire Issue. But I held, that the Verdict is good enough ; for it is in diversis respectibus ; and it may be, he had sufficient Common notwithstanding the Fish-pond, and had not sufficient, in respect of digging the Turfs : So the damages to the Plaintiff is only by reason of the digging of Turfs. And Jones doubted thereof. Per quod Adjournatur.

Hughes *versus* Bennett. Trin. 13 Car. rot. 1536.

COVENANT. Upon demurrer the case was. Edward Bennett Co. 4.
venants, in consideration of a Marriage of his son John Bennett, with Elizabeth the daughter of Hughes, and such a portion to be paid, to stand seized of such Lands to the use of the wife for life, and to the use of the son in tail, and Covenants in the said Indenture in form following, viz That he was seized in fee of those Lands of a lawful Estate in fee, notwithstanding any Act done by him, &c. And, That the said Lands were of the annual value of 200 l. per annum,

num, ultra Reprisas. The Defendant pleaded, That they were of the value of 200 l. per annum, notwithstanding any Act done by him. And hereupon the Plaintiff demurred. And it was argued by Lane for the Plaintiff, and by Rolls for the Defendant. And after Argument at the Barr, all the Court resolved, That these words, Notwithstanding any Act, &c. do not refer to the second Covenant, but only to the first part: But the value is properly in the consulance of the Covenantor. And it was his intent, That she should have a Joynture of the annual value of 200 l. absolutely: And it is not proper to say, That for any thing by him, &c. it should be of such a value; but absolutely, That it should be of such a value: Whereupon it was adjudged for the Plaintiff.

Termino

Termino Paschæ, anno decimo quarto *Caroli*
Regis in Banco Regis.

Hall *versus* Marshall. Mich. 13 Car. rot. 41.

ERror of a Judgment in the Common Bench, in Assumpsit. 1. Whereas the Defendant, in consideration of 130 l. paid and secured to be paid, bargained and sold unto him, septimo Martii, nono Caroli, anno 1634. all the Furzes growing upon such a parcel of Land, to be taken before Mich. 1635. That the Defendant, in consideration, &c. assumed to the Plaintiff, that he should peaceably permit him to enjoy the said Furze, and quietly to carry them away without disturbance; And although the Defendant had permitted him to carry away fifty loads of the said Furze; yet he did not permit him to enjoy all according to his promise; but disturbed him from taking 1000. Loads of them, which were growing upon the Land at the time of the Bargain. Upon Non Assumpsit pleaded, and found for the Plaintiff, and Judgment given in the Common Bench. The Error assigned was, because he doth not shew the certain time of disturbance, whether it were before Michaelmas 1635. otherwise there is no cause of Action. But all the Court resolved, That this is no cause of Error; For being after Verdict, it is intended, that it was within the time, the Defendant having pleaded Non assumpsit, and the cause of the damage appearing upon the Trial, otherwise there had been no cause to have damages: And it is not material that the time of the disturbance should be alleged in the Declaration; for it is collateral to the promise: Wherefore the Judgment was affirmed.

James *versus* Tutney. Hill. 11 Car. rot. 753.

ERror of a Judgment in Replevin, in the Common Bench. 2. Where the Defendant made Conusance as Bayliff to Sir John Stowell, For that the said Sir John Stowell was seized in Fee of the Manor of Somerson, whereof a great Waste called Kinsmore is, and from time whereof, &c. was parcel. And that the said Sir John Stowell, and all those whose Estate, &c.

have

have had, time whereof, &c. in the said Moor, A Court to be holden twice every year by the Steward of the Manor, in which Court, upon reasonable Summons, all the Commoners within the said Common have used to appear, or to be amerced: And that within the Manor is such a Custom, That the Steward should out of the Commoners, choose a Jury to inquire of all Purprestures and Disturbances within the said Common; And that the said Jury had used to make Ordinances concerning the well using the Common; And that all those who had Common, had used to be obedient to the performance of those Ordinances, under a reasonable pain to be set down by the Jury: For which pains forfeited, the Lord of the Manor hath used, time whereof, &c. to distrain; and alledges in fact, That at such a Court a By-law was made by such, being Jurors, whereby it was ordered, That no Commoner should keep any Sheep in the bounds below the Heere, under the pain of three shillings four pence. And for keeping Sheep against the said Ordinance, and the penalty forfeited, the distress was taken. And upon this consuance the Plaintiff demurred. And Judgment being given for the Avowant, Error was brought; And now Bear assigned for Error, first, That this was not a good By-law to bind one for his Inheritance. But all the Court held, That an Ordinance by custom for the Government of the Common is good; And this is not to take away the Inheritance, but for regulating the Common. Vide 15 Eliz. Dy. 314. Co. 5. 62. 21 H. 7. 40. Secondly, Because he doth not shew, that the Plaintiff had notice of this Ordinance. But it being proclaimed in Court, as 'twas alledged in the Plea, he, being a Commoner, is bound to take notice thereof; for none else is bound to give him notice. Thirdly, Because costs are given in this Case to the Defendant; And it was said, that it is out of the Statutes of 7 H. 8. & 21 H. 8. being a Distress for a penalty. And of that point the Court would advise. Vid. Residuum 532.

The King *versus* Heyward, and two others, his Sureties.

3. **S**cire facias upon a Recognisance of the good behaviour. The Breach was assigned, Because Heyward said to a Constable, in executing his Office, Thou art a lying Rascal. Secondly, Because he said to another who threw down his hedges, One of you is dead of the Plague, and I hope I shall see more of you to dye of the Plague. Thirdly, Because he said to a woman, That she was an Whore and Jade, and other foul words concerning her Incontinency. Fourthly, Because he said to one in the Church-yard, after Evening-prayer, That he was a forsworn Knave, and a perjured Knave. The Defendant pleaded Not guilty. And upon evidence at the Bar, it appeared by one witness, that he spake to the Constable,

Termino Trinitatis, anno decimo quarto Caroli Regis,
in Banco Regis.

Nevison versus Whitley.

DEbt upon an Obligation of 100 l. dated 12. Julii, 10 Car. 1. with condition for the payment of 58 l. at the end of six Moneths. The Defendant pleaded the Statute of 21 Jac. of Usury, which makes such an Obligation to be void, &c. The Plaintiff replies, That he lent the fifty pounds for a year, and that the Defendant should pay eight pounds for the forbearance for a year, and that the Plaintiff should not demand it until the end of the year; And, by the Scriveners mistake, it was made payable at the half years end; and he, not knowing thereof, accepted of the said Bond: Wherefore, &c. The Defendant rejoyns, That the lending was only for half a year, and that he was to pay for it eight pounds for that time, and traverseth, That upon the said 12. of July, it was agreed the loan should be for one intire year, Or that he should forbear it for a whole year. And hereupon the Plaintiff demurred: And Rolls for the Plaintiff shews, That the barr was ill, because it was not pleaded, Quod corrupte agreeatum fuit, &c. for so is the course of pleading. And the Plea is, That he should have for Interest for forbearing; And he doth not say corrupte, &c. And for this cause the Court (absente Brampton) held, That the barr was ill, And that the Replication is well enough. Secondly, It was objected, That this allegation is against the words of the Condition. But all the Court held, he might well make such an allegation; For it is the shewing of the true agreement, That no interest was to be paid by the said agreement, but such as stood with the Law. Thirdly, Rolls excepted to the Rejoynder, because he makes thereby the day to be parcel of the Issue, which ought not to be, but he ought to have traversed the agreement only; and therefore the Rejoynder to the barr was ill. And this was the opinion of the whole Court: but no Judgment, because the Plaintiff offered to accept his Debt, and the Defendant offered to pay it, &c.

Lloyde *versus* Gregory.

2. **E**jectione firmæ. Upon special Verdict the Case was. A Lease for ninety nine years being made by a Dean and Chapter 1 Ed. 6. to begin at the feast of the Annuntiation, after the end of a Lease of fifty years, made anno 35 Hen. 8. This Lease being assigned to John Shepheard and William Shepheard, Infants of eleven years of age, They, anno 29 Eliz. (which was before the end of the term for fifty years) take a new lease of the same Lands from the Dean and Chapter, for the same term, and for the same rent, and upon the same covenants; And after the end of the said term for fifty years, the Infants being of full age, enter, and hold by that second Lease, and pay the rent accordingly to the Dean and Chapter, which they accept for divers years: And afterwards a new Dean and the Chapter cause an entry to be made, to avoid this Lease, and let it to the Defendant, who entered and ousted them who were Infants, and made a Lease to the Plaintiff, &c. This was argued by Whitwick for the Plaintiff, and by Maynard for the Defendant. The first question was, Whether an Infant may surrender a future interest by the taking a new Lease; For if he had actually surrendered, it had been void, being but an interest of a Term; And for that point, all the Court held, that a surrender by an Infant cannot be by Deed, but it is absolutely void; and that a surrender by acceptance of the second Lease is void, because it is without increase of his term, or decrease of his rent; and where there is not an apparent benefit, or the semblance of a benefit, his Acts are merely void, and here is no benefit or appearance of any to the Infant, for he hath no manner of advantage thereby, but cause of quarrelling by this Lease. Secondly, Whereas it was objected, That it doth not appear, that the Infants had a Lease for ninety nine years; for it is misrecited in the Grant, viz. the Grant mentions the Lease for ninety nine years to commence ad festum Annuntiationis, after the Lease for fifty years be determined, and it ought to be a festo Annuntiationis, The Court held it to be all one, for there shall be no fraction of a day, and it shall begin instantly from the determination of the former Lease; and it is not like the Case of Millward and Manwaring, Where there was a recital, That a Lease was made 28 Hen. 8. for years, and that Lease was granted, &c. whereas in truth it was dated 27 Hen. 8. For there is a whole years difference, and no such term; Wherefore it was adjudged for the Plaintiff.

Arundel *versus* Sanders. Hill. 13 Car. rot. 1266.

3. **T**Respals upon the Case, brought by Bill in the Kings Bench, supposing, That the Defendants Father held of him such Land

stable, because he affirmed, that the Defendant used to carry Picklocks about him, Thou art a lying Rascal. And the other witnesses on the behalf of the King, did not prove, That these words were in disturbance of the execution of his Office, or for any act about the executing of his Office. And for all the other words, they were words of heat and intemperance; But none of them tended to the breach of Peace, or to the terrour of any, nor was there any act done, but only evil words, And of those words, the persons against whom he spake them, gave the occasion. And although the manner of speaking may be good cause in discretion, to bind one to his good behaviour; yet one being bound, words only, which tend not to the breach of Peace, or terrifying others, or unto Sedition, &c. shall not be sufficient cause of forfeiture of a Recognisance; For then, by such pretence of words a man should be in danger of his Recognisance, which would be inconvenient. Wherefore it was left to the Jury to consider of the verity and validity of the Evidence, and of the manner of speaking them. Whereupon, they being a substantial Jury, considering thereof, gave their Verdict for the Defendant, That he was not guilty. Vide 2 H. 7. c. 22 Ed. 4. 35. 18 Ed. 4. 28.

The King and Informer *versus* Fredland.

Error of a Judgment in London. Upon an Information upon 4. the Statute of 5 Eliz. for using a Trade wherein he was not brought up as an Apprentice for seven years, viz. for using the Trade of an Hempdresser. And for this the Error was assigned, and all the Court held, That this is no such Trade as is within in that Statute; For it is not a Trade requiring much learning or skill, And every Husbandman doth use it for his necessary occasions, and it is not within the words or intent of the Statute. And Jones said, He much doubted of the using the Trade of Baking and Brewing. But it was thereto answered (to which he agreed) That it extends only to common Brewers and common Bakers, and not to any who brew or bake in their private houses; whereupon Rule was given (absente Brampton) That Judgment should be reversed, unless cause, &c. Note, this was without argument, being conceived to be a clear Case.

Anonymus.

Action upon the Case, for diverting of an ancient Water-course, 5. qui currere consuevissent & debuisse to his Will. After Not guilty pleaded, and found for the Plaintiff, it was moved by Rolls

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in arrest of Judgment, That the Declaration was not good, because he doth not shew any title to the Water-course by prescription or otherwise. But Grimston for the Plaintiff argued, That the Declaration was well enough; For being alledged, that it is antiquus Aquæductus, And that by it the water currere consuevisset & debuisset, it compriseth in it self sufficient title, especially against a stranger who diuerted it: And all the Court being of that opinion, it was adjudged for the Plaintiff.

Afterwards the same day, another Action upon the Case, for diuerting an ancient Water-course, qui ad terram *le Plaintiff's* currere consuevisset & debuisset, to water his Land, and for his Cattel to drink. After Verdict for the Plaintiff, Serjeant Henden took the same exceptions, and the same Rule was given against him.

Termino



Land by Knights service, and died in his Homage, his Heir within age; and that he tendred unto him a convenient Marriage, and shew what, &c. and demanded of him the value of the Marriage, &c. The Defendant Protestando to the Tenure pro placito, traverseth the Tender, &c. And hereupon the Plaintiff demurred, and it was resolved, that the Plea was ill; For the Tender is not traversable. But Bear for the Defendant moved, that the Declaration is ill, because he declares in an Action upon the Case, where it ought to be in valore Maritagii. And the Court doubted of this point, because there is an especial original Writ de valore Maritagii. But Jones conceived, that Action upon the Case is maintainable. As an Action upon the Case lies for an Escape, as well as Action of Debt; so here it may be the one way or the other. Another Exception was taken to the Declaration, because it is not shewn, that the Ancestor was seized in fee of the Land supposed to be held, &c. And that was conceived to be a material exception. Et adjournatur.

Middlemore versus Goodale.

Covenant. Whereas the Defendant by Indenture incoffed J.S. 4. of such Lands, and covenanted for himself and his Heirs with the Feoffee his Heirs and Assigns, to make further assurance upon request: which Lands J. S. conveyed to the Plaintiff, who brings this Action, Because the Defendant did not levy a Fine upon the Plaintiffs request. The Defendant pleaded release from the said J. S. with whom the first Covenant was made, and it was dated after the commencement of this Suit; and thereupon the Plaintiff demurred, and all the Court agreed, That the Covenant goes with the Land, and that the Assignee at the Common Law, or at leastwise by the Statute, shall have the benefit thereof. Secondly, they held, that although the breach was in the time of the Assignee, yet if the release had been by the Covenantor (who is a party to the Deed, and from whom the Plaintiff derives) before any breach, or before the Suit commenced, it had been a good bar to the Assignee, from bringing this Writ of Covenant. But the breach of the Covenant being in the time of the Assignee, for not levying a Fine, and the Action brought by him, and so attached in his person, the Covenantor cannot release this Action, wherein the Assignee is interested; Whereupon Rule was given that Judgment should be entred for the Plaintiff, unless cause was shewn to the contrary by such a day. Vide residuum postea, pag. 505.

Thomas Harrisons Case.

Thomas Harrison was endited; For that 4. Mail 14 Car. the 5. Courts of Common Bench, Kings Bench, and Chancery, sitting, he rushed to the Bar of the Common Bench, and in disturbance of the Justices, and of the Court, and administration of Justice,

Justice, and against the King, and his Regal Majesty palam & publicè & malitiôsè, intending to draw Justice Hutton, one of the Justices of the Common Bench, into displeasure of the King, and of other his Subjects, and to bring him into danger of his life, and forfeiture of his life and goods, spake these words of him, the said Justice Hutton, in the presence and audience of the Justices there sitting, I Accuse Mr. Justice Hutton of high Treason: He being hereof endicted, pleaded Not guilty, and by a Jury of Knights and Esquires was found guilty; He confessing that he spake those words purposely and openly, because Judge Hutton in his Argument in the Exchequer Chamber maintained, that the King might not charge his Subjects to find Ships, and that therein he denied his Supremacy: And also, that by this means stirred up the Subjects to sedition against the King. And being hereupon found guilty, the Judgment was, That he should pay a Fine to the King of 5000 l. and be imprisoned during the Kings pleasure, and should have a Paper upon his head shewing his offence, and go therewith to all the Courts of Westminster, and make his submission in every Court in Westminster-Hall, and in the Exchequer, for it is an offence to every Court. And it was informed by Keeling Clerk of the Crown, That Imprisonment during the Kings pleasure is usually entred, and not Imprisonment during life, but where there is an awarding of forfeiture of Lands during life.

The Marquess of Winchesters Case.

6. **E**Rror to reverse a Judgment for the King upon an Endicment against him by the name of **Lord St. John**, for Recusancy, for his absence from Church for two moneths; whereupon he appearing, and pleading Not guilty, it was found by Verdict, That he was guilty for the absence of one of the moneths, parcel of the time, and not guilty for the other moneth; Wherefore it was adjudged, That he should forfeit twenty pound, and for the other moneth eat inde fine die; And the Kings Attorney signified his Majesties pleasure, That if it were erronious, it should be reversed; and Rolls assigned divers Errors; First, That the Endicment is apud Castrum Winton, and he doth not say in what County or Parish Winton is. Secondly, It is coram John Finch, &c. Justiciariorum de Gaila deliberand. and he doth not say, Justiciariorum ad Affilas & ad Gailam deliberandum. Thirdly, Because the Endicment is against him by the name of Dominum St. Johns, without other addition. Fourthly, Because the Endicment is Quod non accessit ad A. Ecclesiam Parochialem prædict. And there is not any Church mentioned before: And the Court held, that none of the Exceptions were material; and it was doubted whether any exception be good upon conviction of Recusancy; For the Statute of 3 Jac. is precisely, That it shall not be void or discharged for default of form, or other matter, until after conforming himself by coming

coming to the Church. But afterwards, because the Judgment was not Ideo capiatur, and the omission thereof is apparent to the Kings prejudice, And for that, upon every conviction in Endicement, the Judgment is Quod capiatur, for this cause the Judgment was reversed.

Middlemore *versus* Goodale. Ante pag. 503.

WAs moved again by Bear for the Defendant, and he took 7. Exception to the Declaration, that it was not good, because he brings the Action, as Assignee of Assignee of the Covenantor, and shews, that the conveyance was made to the Plaintiff, and Frances his Wife, and to the Heirs of the Husband; and he brings the Action sole without naming his Wife, who is yet alive; so it is not good; for he ought to have joyned his Wife with him in the Action. And of that opinion was all the Court (absente Brampton;) Whereupon Judgment was given for the Defendant, Quod querens nihil capiat per Billam.

Mann *versus* the Bishop of Bristol. Robert Hide and Richard Hide Incumbent. Pasch. 14 Car. rot. 467.

QUare impedit in the Common Bench, for the Church of Wootton Fits payn in the County of Dorset. The Plaintiff entitles himself to the Advowson, for that Margaret Chubb was seized in fee of the Manor of Wootton Fits-pain, ad quod the Advowson was appendant, and upon 12. Septemb. 20 Jac. let it to Robert Cook for years, a die datus, that 13. Septemb. 20 Jac. he entred and was possessed, And that Margaret by Indenture 13. Sept. 20 Jac. granted the Reversion to William Bishop and others, to the use of the said Margaret for her life; and after to the use of Joan Cook and the Heirs of her body. That afterward Margaret died, and Joan entred, and levied a Fine to the said John Mann of the said Manor, ad quod, &c. Whereupon at the next Avoidance the Plaintiff presented, &c. The Defendant Robert Hide confesseth the seisin in fee of the said Margaret, & that she infeoffed him of the Manor, ad quod &c. whereby he presented, &c. and traverseth the grant of the Reversion, modo & forma, &c. and Issue thereupon. Richard Hyde, as Incumbent, pleads and intitles himself; for that Margaret Chubb being seized in fee 4. Aug. 19 Jacobi, by her Deed granted to Robert Jacob the first and next Avoidance; and that Robert Jacob died and made such a one his Executor, who granted the next Avoidance to the said Robert Hyde, who presented thereto the Defendant Richard Hyde. The Issue was upon this, Non concessit: The Jury upon these Issues found a special Verdict. For the first, they find the Lease and Grant of the Reversion; and that it was to the use of the said Margaret, during her life; and after to the use of Robert Cook, until Joan Cook came to

the age of twenty one years; and after to the use of Matthew Chubb and Joan Cook, and the Heirs of the body of Joan, by the said Matthew to be engendered; and after to the use of the said Joan and the Heirs of her body; and after to the use of Robert and his Heirs. And they find, that Joan accomplisht her age of twenty one years before this Action brought, and that Matthew died without Issue of the body of the said Joan, And that upon 4 Aug. 19 Jacobi, Margaret granted to the said Robert Jacob, *durante vita ipsius Roberti primam & proximam advocacionem, &c.* and that he died before the Church became void; and whether this were an absolute grant of the next avoidance, as it was pleaded, or not, was the question? And it was adjudged in the Common Bench for the Plaintiff, *Quod non*: And this Judgment was here affirmed; for it is not an absolute grant of the next Avoidance, but it is limited unto him to present to the Advowson, if it becomes void during his life, and not, that otherwise it should go to his Executors. Secondly, It was moved by Holbourn for the Plaintiff in the writ of Error, that the issue being upon the grant of the Reversion, whether it were granted *modo & forma prout* The Verdict found, that it was granted to the use of Margaret for life; and after to the use of, &c. *ut supra*. And although it be found, that the Estates were determined before the Action brought, yet it should have been shewn; For there is no such Grant, *modo & forma prout*. But it was argued by Grimston for the Defendant, That these Estates being determined, need not be mentioned, especially in this possessory Suit, The question being only for an Avoidance fallen; And although the Travers be found, *Quod concessit modo & forma*, that extends not to the uses limited, but *non concessit Reversionem modo & forma prout*, and it is found *Quod concessit Reversionem modo et forma*, and the Estates determined, need not be mentioned, as 14 Ed. 4. 1. Feoffment to three, the one dies, it may be pleaded to be made to the Survivors, not mentioning him that is dead; and all the Court being of that opinion, Judgment was affirmed.

Evans and Cottingtons Case.

9. **E**Vans and Cottington, and seven others, were indicted for a grand Riot, That they, with others there named, to the number of one thousand persons, made a Rescue and Assault upon Henry Smith a Bayliff, who, by virtue of a Warrant upon a Bill of Middlesex, against William Cleer, had arrested him, and was carrying him to Prison, and they procured him to escape. The Arrest was at Charing-Cross in the Parish of St. Martins in Middlesex; and after the Arrest, they assaulted the Bayliffs, and beat them; and the Bayliffs putting the Prisoner into an house for safe keeping against the Tumult, they assaulted the House, and notwithstanding a Justice of peace, assisted with three Constables made proclamation

ted of four pound per annum by John Smith to Nathaniel his Son in fee, issuing out of an house called the Unicorn, in Lynton, payable at the Annunciation and St. Michael, at the house of the said Nathaniel, in Lynton, to begin at Michaelmas after his decease, and gave six pence in name of Seisin: And for rent due at the Annunciation 1637. and six years before, and not paid, &c. The Jury find the grant of the rent and seisin given, and the demand at the said house called the Unicorn, at the said feast of the Annunciation 1637. and that none was there to pay it; And whether this were a disseisin for the Rent arrear, was the question? The doubt was, whether it were a good demand for the Rent, at the feast of the Annunciation, at the house out of which it was issuing, and not at the house where it was payable: And it was resolved by the chief Justice and by my self, being Justices of Assize, after advice had with other of the Judges, who were of the same opinion, That it was a good demand, and a disseisin for not payment; and that this gift of six pence in name of seisin was good seisin: And the Jury found all in damages, viz. twenty four pound, not mentioning it to be for Arrearages of Rent; and it was well enough, for the Presidents warrant both wayes; Whereupon it was adjudged for the Plaintiff. Vide Cok. Litt. 153. Cok. 7. fol. 28. and the Book of Entries fol. 78. & 79. Hill. 45 Eliz. rot. in Com. Banc. Midd. Assize for a Rent-seck.

Termino Trinitatis, anno decimo quarto Caroli Regis,
in Banco Regis.

Anonymus.

Trespas against *Baron* and *Feme*, for breaking 1.
his Close. After Verdict for the Plaintiff, the *Baron* died
betwixt the day of the Nisi prius, and day in Banco. And
now Archibald moved, That no Judgment should be entered: For
the *Baron* being dead, the Action quoad her, by the act of God, is
abated: And for that cited 6 Ed. 3. 295. 11 H. 7. 6. And it was
held by all the Court, That the death of the Plaintiff or Defen-
dant, after Verdict by Nisi prius and before the day in Banco, shall
abate the Writ or Bill. And although *Baron* and *Feme* be but one
person in Law, yet, for as much as the *Baron* is dead before the day
in Banco, no Judgment may be entered; And if it be entered, it is
Error. But because this is in an Action of Trespass which is but
personal, and is joyned and several, the Court doubted: For it is
clear, If the *Feme* had been dead, and the *Baron* survived, Judgment
should have been entered against him. And the reason is the same,
that the surviving should be chargeable for the Trespass. But
whether the Bill shall abate, the Court would advise, per quod
ad journatur.

Ceely versus Hoskins. Hill. 13 Car. rot. 696.

Error of a Judgment in the Common Bench, in an Action for 2.
these words, Thou art forsworn in a Court of Record, and that
I will prove. After Verdict upon Not guilty and found for the
Plaintiff, the Defendant there moving that these words were not
actionable, and Judgment being there given for the Defendant, a
Writ of Error was brought and assigned in point of Judgment.
And now Rolls for the Plaintiff, in the Writ of Error, moved to
have the Judgment reversed, because the words are very slander-
ous; and as much, as if he had said, He was a perjured person.
But Maynard for the Defendant, in the Writ of Error, said, That
it had been much debated in the Common Pleas, and the Court
there agreed, That the Action would not lye; and he conceived the
reason to be, Because he did not say, in what Court of Record he
was forsworn; Nor that he was forsworn in giving any evi-
dence to any Jury: And it may be that he intended only, that he
was forsworn, not judicially, but in ordinary discourse in some
Court

Court of Record. But Jones, Berkeley and my self, held cleerly, That the Action well lay; and such forraign intendment as Maynard pretended, shall not be conceived; And it shall be taken that he spake these words maliciously, accusing him of perjury, and for a false Oath taken judicially upon judicial proceedings in a Court of Record, and shall be understood according to the common speech and usual intendment: as to say, Such one is a murtherer (not speaking whom he murthered, or when) an Action lies; And it shall not be intended that he was a murtherer of Pares, unless such forain intendment be discovered or shewn in pleading. Wherefore they all held, That the Judgment is erroneous. But because Brampton was absent, they would advise. And afterwards the Judgment was reversed, and the Plaintiff recovered.

Morley versus Pragnell. Trin. 14 Car. rot. 549.

3. **A**ction upon the Case. Whereas the Plaintiff is owner of a common Inn in Eastgestock, That the Defendant maliciously erected a Tallow-furnace, and boyled therein much stinking Tallow, to the great annoyance of him and his Guests: And by reason of such stench, arising thereupon, many of his Guests left his house, and many of his Family became unhealthful. Upon Not guilty pleaded and found for the Plaintiff, Germyn Serjeant moved in arrest of Judgment, That an Action lies not; For he being a Tallow-Chandler, ought to use his Trade, which cannot be said to be a Nuisance. But all the Court held, That as the Declaration is penned, the Action is maintainable: For every one ought sic uti suo, quod alienum non ledat: Then when the Plaintiff is an Inn-keeper, the Defendant erecting a Tallow-furnace annoyed his house with stench, especially by boyling stinking stuff: And so in the Case of Tohayle, who erected a Tallow-furnace crosse the Street of Denmark-house in the Strand, it was found a Nuisance upon the Endicment, and adjudged to be removed: Whereupon Judgment was here given for the Plaintiff.

Jeffryes versus Payhem. Trin. 14 Car. rot. 528.

4. **A**ction for these words of the Plaintiff being an Attorney, He is a base cheating cozening knave, and hath cheated me as never any man was cheated. The question was, whether an Action would lie for these words? For if he had not shewn, that he was an Attorney, an Action would not have lien; And as it is layed barely without any circumstance, it doth not appear, that it toucheth him in his profession: And therefore the Court would advise.

Droit

Droit d' Advouſon for the King *verſus* Sir John Dreidon
and three others.

The parties being at iſſue, and put upon the grand Aſſiſe, there
iſſued thereupon a Venire facias, to return quatuor Milites,
That they, cum ſeiſis, ſhould return twelve others, who, with the
ſaid four, ſhould make a Jury returnable octabis Michaelis: And
upon the day of Eſſoyne, viz. 16. Octob. 14 Car. the Demandant ap-
peared, and prayed, that the Tenants be demanded. And before
Juſtice Berkley (who only kept the Eſſoyne) the Tenants being de-
manded, James Turlow, their Atturney, appeared; And the Deman-
dant prayed, that their default might be recorded, for they ought to
appear in perſon. But Berkley held, that they might well appear
by their Atturney, who was admitted before upon the Record: And
afterward he prayed for the Tenants, that they might be eſſoyned;
which being contradicted by the Plaintiff, Juſtice Berkley cauſed
the prayer to be entred. And after the four Knights being called
appeared, and they were appointed to chooſe others unto them;
And there being a queſtion about the number, they were appointed
to chooſe twenty unto them, to make the number compleat (as the
Clerks ſaid was the courſe.) But now being moved in full Term,
it was reſolved firſt, That the Tenants may appear by Atturney.
Secondly, That the Eſſoyne caſt was not allowable, becauſe the
appearance by their Atturney was entred and recorded; And if an
Eſſoyne would lye, It ſhould be as well caſt for the Atturney as for
the Tenants. And when an appearance by their Atturney is recor-
ded, they cannot at the ſame time be Eſſoyned: wherefore, for this
cauſe, the Eſſoyne caſt was diſallowed. Thirdly, The queſtion was,
Whether this *Eſſier* of twenty to the four Knights be good, Or
whether they ought to chooſe and return twelve only; And if there
ought to be twelve only returned, whether the return of twenty
makes not the whole return void; Or that it ſhall be good for the
twelve, and ſurpluſage for eight? Hereof the Court would adviſe.
And whether there might be any challenge againſt any of the four
Knights, becauſe no exception was taken againſt them the firſt
day? Vid. 15 Ed. 4. 1. 39 Ed. 3. 2. 7 H. 4. 2. 22 Ed. 3. 18.

Mulcarry and *verſus* Eyres and others. Mich. 13 Car. rot. 333.

Error of a Judgment in the Kings Bench in Ireland, in Ejecti-
one firmæ of a Leaſe by the Earl of Tumond of forty Meſſua-
ges, five hundred acres of Land, forty acres of Meadow, two hun-
dred acres of Paſture, one hundred acres of Bogg, and one hun-
dred acres of Bruery, in the Villages and Territories of D. S.
and V. Upon Not guilty pleaded, a ſpecial Verdict was found,
That the Earl of Tumond, being ſeiſed in Fee, let it to the Plain-
tiff for one and twenty years, reſerving rent, with condition, that he
ſhould

should not lett or alien any part above three years ; and if he did, that the Lease should be void, and he reenter. And he let for three years ; and so from three years to three years, during the term of his life, if he lived so long. And the Earl, after this assignment accepted the rent due from the Assignee, and notwithstanding re-entred, and made this Lease to the Plaintiff. And the Defendant re-entred. The Questions made in Ireland upon this Lease were, first, Whether it were a breach of the Condition ? Secondly, Whether the acceptance of the rent by the hand of the Assignee, makes it good, and dispenseth with the breach ; especially the acceptance being at another rent-day ? And it was resolved there, and adjudged for the Defendant. But the Court here resolved, That it was a plain breach of the Condition. And the acceptance after might not dispense with the Condition, seeing it was that it should be void : So it was absolutely determined. But then an exception was taken here to the Declaration by Grimston, That one hundred acres of Bogg was not good ; for there is not any such word known. But it was held to be an usual word there and well known ; and if it were not, yet the Plaintiff might release his demand as to that Land, and have his Judgment for the residue. Another exception taken by him was, Because it was in Villis & Territoriis. But it was held to be well enough ; for they be of the same sense ; And if not, it is but surplusage for Territoriis : Whereupon Rule was given, that Judgment should be reversed, unless other cause were shewn. And afterwards, being moved again, the Judgment was reversed ; and Judgment given for the Plaintiff, Quod recuperet Terminum suum prædictum. And it was moved how Habere facias possessionem should be awarded ; And resolved, That there should be a Writ directed to the chief Justice in Ireland to reverse that Judgment, and commanding to award Execution.

Thomas Smith *versus* Richard Cooker. Trin. 14 Car. rot. 1499.

7. **A**ction for these words of the Plaintiff, Thou and thy Wife (innuendo the Plaintiff and Agnes his Wife) are both Witches, and have bewitched my Mare, innuendo the Mare of the said Thomas (where it ought to have been the Mare of the said Richard) After Verdict (upon Not guilty) for the Plaintiff. It was moved in arrest of Judgment for the Defendant, because that two cannot commit one Witchcraft. Also it cannot be the Mare of the Plaintiff and the Mare of the Defendant as prædicti Thomæ imports. Sed non allocatur, for the words ought to be referred, as they were spoken, viz. That both of them bewitched my Mare ; and both refers to each of them, that they had severally committed the offence : For if a man saith to two, you both have murdered J.S. each of them shall have his Action severally, and not jointly, as 28 Hen. 8. fol. 19. Dyer is. And for the last words, innuendo the Mare of Thomas, Tho-



Anonymus.

Kemp *versus* Barnard, Hill, 13 Car. rot. 1252.

Talory *versus* Jackson. Trin. 14 Car. rot. 187.

Anonymus.

ERror in the Exchequer Chamber of a Judgement given in an
Ejectione firmæ in the Kings Bench. The Plaintiff assigns for
Error

Error (That whereas five were named Defendants; and in the Record it is mentioned, That after the Verdict against them all, and after the last Continuance, two of the Defendants were dead, as the Plaintiff surmised; and the Defendants hoc non dedicerunt, sed cognoverunt fore verum the Judgement is entred against the three,) That the two did not die since the last Continuance made upon the Roll, but long time before the Verdict, and before divers Continuances upon the Roll entred; Whereupon Banks the Kings Attorney moved, That it might be examined in this Court; but the Court held, That they might not here make any such examination, being after the Judgement entred: And then it was moved, whether an Error in Deed be assignable in the Exchequer Chamber upon the Statute of 27 Eliz. Because as Berkeley said, the Statute only gives authority to examine Errors in Law. But Brampton, Jones, and my self, held, That it is well assignable; for the Statute giving the Writ of Error, gives that authority, as well to examine Errors in Deed, as Errors in Law. Then it was moved how it should be tried, and Hodgesden the Secondary said, That it hath been tried by Nisi prius out of the Exchequer Chamber, and there be divers presidents to that purpose. But Jones said he doubted thereof, because the Statute gives this power to the Justices of the one Bench and the other, And that the Court of the Exchequer Chamber is newly erected. And Berkeley held, That it was not the intent of the Statute, 27 Eliz. to give them such authority. But Brampton chief Justice and my self doubted thereof, Because the Statute giving authority to reverse or affirm, implies an allowance of the means to do it; Whereupon adjournatur. Mich. 4² & 43 Eliz. rot. 335. Rewe versus Long. Error in the Exchequer Chamber *in fait* assigned and tryed by Nisi prius, and found, and for that cause reversed. Simile Hill. 16. Jac. rot. 75 Error *in fait*, assigned there, and tried by Nisi prius. Consimile Mich. 10 Car. rot. 169. betwixt Smith and Marchant.

Thornton versus Lyster.

12. **T**Respass of Assault, Battery, and Wounding 1. Aug. 13 Car. The Defendant Justifies in his own defence, by reason of an Assault made by the Plaintiff: Issue being thereupon, the Defendant gives in evidence Assault and Battery by the Plaintiff, 1. Julii 13 Car. before, and that it was in his own defence, and produced divers Witnesses to prove it. The Plaintiff shews, That the Battery which he intended, was 9. Jul. 13. Car. and produced also divers Witnesses to prove that. And Littleton the Kings Solicitor and others of Counsel with the Defendant insisted, That it was no evidence; for the Plaintiff ought to have made a special Replication, and shewn that special matter. But all the Court held, It was not requisite; And if another day had been shewn in the Replication, it should be a departure: But it sufficeth to shew it in evidence to be

be done at another day, *sans son assault*, for the day is not material. Jones said, if they had both agreed upon one day, it should have been specially pleaded: But Brampton held, It was all one; and as it is now pleaded to be at several dayes, it is cleerly unnecessary: And the Solicitor urged, that it should be found specially: But the Court said it was so cleer, they would not have it so found. And the Jury gave one hundred pound damages.

Latham *versus* Atwood. Mich. 11 Car.

Action of *Trover & Conversion*, of two hundred and fifty pounds 13.
of Hops. Upon Not guilty pleaded, the Case appeared to be. *Feme*, Tenant for life, takes to Husband the Plaintiff, quinto Caroli, the Remainder being to the Defendant for his life. These Hops were growing out of ancient Roots, being within the Land in question: The *Feme* dies 19. Aug. nono Caroli, the Hops then growing and not severed, &c. And whether these Hops appertain- ed to the *Baron*, or to him in Remainder, was the question: because she died so small a while before the gathering of them; and they be such things as grow by manurance and industry of the owner, by the making of Hills, and setting Poles. And the Court, upon the motion of Grimston, who was of Counsel with the Plaintiff, held that they be like Emblements, which shall go to the *Baron*, or Ex- ecutor of the Tenant for life, and not to him in Remainder; and are not to be compared to Apples or Nuts, which grow of them- selves; Wherefore adjudged for the Plaintiff.

Bayns *versus* Brighton.

DEbt for 40 s. upon a Bill obligatory, and declares, That the 14.
Defendant by his Bill, dated Febr. confessed himself to be indebted to the Plaintiff in twenty shillings, solvend. at Micha- elmas following, Ad quam quidem solutionem faciend. he did ob- lige himself in forty shillings, and for non payment of the forty shillings the Action was brought. The Defendant pleaded, that at the time of the Obligation making, he was within age, and issue thereupon, and found for the Plaintiff: And now Germin Serje- ant moved in arrest of Judgment, that the Declaration was ill, because it is not therein alledged, that the twenty shillings was not paid at the day; for if otherwise, the forty shillings is not due: And of that opinion was all the Court: For it is not an Obligation with a Condition; Whereupon Rule was given, that Judgment should be entred for the Defendant, unless, &c.

Anonymus.

ERror of a Judgment in the Common Bench, in Action for 15.
words. Whereas the Plaintiff being an Attorney, and main-
C t t 2 taining

taining himself, his Wife, and Children by his practice, that the Defendant spake these words of him, and of his Office, He is a very base Rogue, and a cheating Knave, and doth maintain himself, his Wife, and Children by his cheating. Upon Not guilty pleaded, and verdict for the Plaintiff, and Judgment given, the Error assigned was, That an Action lay not for these words. But all the Court held, That the Action was maintainable; For it toucheth him in his profession; Whereupon Judgment was affirmed.

Davenport *versus* Pensell. Trin. 14 Car. rot. 698.

16. **A** Sumpsit against an Administrator, durante minore ætate of J. S. upon a promise to pay for forbearance of a sum, &c. The Defendant pleads, That the said J. S. was above the age of seventeen years at the time of the promise; and thereupon it was demurred. The question was, whether the Administration so committed, durante minore ætate, instantly determined, by his coming of seventeen years of age; for then the Administration ceasing, there cannot after be any consideration to ground a promise? And it was urged, That in our Law Minor ætas was one and twenty years: But Grimston of Counsel with the Plaintiff said, that this was to be considered according to the Civil Law, which appoints seventeen years to be full age in such a Case, Cok. lib. 5. fol. 29. Et Curia advisare vult.

Appleton *versus* Stoughton. Hill. 10 Car. 256.

17. **D**ebt. Upon the Statute quinto Elizab. and Demand 22 l. because he used within London the Trade of a Point-maker, for the space of eleven moneths, not being brought up as an Apprentice for seven years. The Defendant pleaded the custom of London, That any who is a Freeman of one Trade, may use any other Trade within the City; and pleaded the Statute of 7 Ric. 2. which confirms the Customs of London, &c. Upon this Plea a Demurrer was tendered, and the question was, Whether such a Custom may be good against the Statute of quinto Eliz. But because it was a general Statute, the Court inclined in opinion, That this Custom might be good, and not taken away by the said Statute, being a special Custom in a particular place. Then the Plaintiff took Issue upon the Custom, and the Defendant joined; and the Plaintiff surmised, that there is a Custom in London, That if any Custom of London be pleaded, and denied, and Issue thereupon, it shall be tried by a Wit to the Mayor and Aldermen, to certify whether there be such a Custom; and they shall make their Certificate by the mouth of their Recorder, Ore tenus; and prayed to have a Wit to certify. And because the Defendant hoc non didicit, a Wit was awarded accordingly: And the Recorder certified, that there was no such Custom for one who useth

a manual Trade, that he may exercise any other Trade, not being Apprentice, or brought up thereto; but that there was such a Custom concerning Trades of buying and selling, as Mercer, Grocer, &c. And after this Certificate, it was moved, that this was a Mistrial; For it being a Custom which concerns all the Citizens, ought not to be tried by such a Certificate, but by Jury. And Bulstrode, who argued for the Defendant, insisted much upon a Case in the Common Bench, reported by the Lord Hobert, that a Custom of London, which concerns all the Citizens, shall be tried *per Pais*: But after long deliberation, it was resolved by all the Court, that the *verdict* was good, especially when the Plaintiff hath shewn, that there is such a Custom, that it shall be so certified, and the Defendant hath confessed it; so as this manner of Trial, being as it were by his consent, he shall not after such Trial except against it. And this Custom doth not concern all the persons of London, but only those who use manual Trades: As if the Custom to devise in Mortmain, or of foreign Attachments, had been tried by Certificate; so here the Trial is good; And it was adjudged for the Plaintiff. Vid Cok.lib.4. 30. 39 Hen.6. 34. Coke lib. 9 fol. 31. Broke London 17. 21 Ed.4. 4. 33 Hen.8. Brook Trials 14.

Tomlins *versus* Brett.

ERror of a Judgment in the Common Bench, in *Formdon in Descender*: Where the Tenant vouched J. S. And the Defendant counterpleads, that the said Joh. Style, or any of his Ancestors, &c. nunquam aliquod in tenementis, &c. omitting the word habuerunt. And issue being joyned, and Nisi prius awarded, at the day of the Nisi prius the Defendant made default; And at the day in Banco he made another default; Whereupon a Grand Cape was awarded, and Judgment given: And now Error brought, because there was no Issue joyned by the Tenant. But the Court would not allow thereof, but affirmed the Judgment: For after the default, the issue and the pleading is out of the Court, and the Judgment is only upon the default. 18.

Aungell *versus* Sir William Cooper. Trin. 10 Car. rot. 1331.

ERror of a Judgment in the Common Bench, Where in a Scire facias upon a Judgment of 900 l. and Execution thereupon, the Defendant there being dead, the Plaintiff surmised, that he was seized of Lands in the Counties of Kent, and Surrey, and prayed a Scire facias into the several Counties: And the Sheriff of Kent returned, that Aungell was *Terr-tenant* of the Land in the County of Kent: And the Sheriff of Surrey returned, that one Bell and his Wife were *Terr-tenants* of the Defendants Lands in Surrey. Whereupon Aungell being warned, took up-
on

on him the Tenancy of the Lands mentioned in the Sheriffs return, And pleaded, That another man in the same County at the time of the said return, had other Lands, whereof T. D. was *Terre-tenant*. Sir William Cooper, the then Plaintiff, denied it, and issue thereupon, and found for the Plaintiff, and Judgement for him against Aungell the now Plaintiff. But for the Lands in Surrey, Bell and his wife pleaded, That they were not Tenants: And thereupon they were at issue, and found for them before the Justices of Assise, and Judgement given, *Quod eant inde sine die*. And now Aungell brings Error upon that Judgement, and assigns for Error, That the said Bell was dead before the time of the Triall: whereupon it was demurred: And now argued at the Barre by Maynard for the Plaintiff in the Writ of Error, That for as much as the Plaintiff is not to have his Land charged sole, if there be more Land: And by the surmise of the Defendant (who was Plaintiff in the first suit) there is Land in the County of Surrey chargable therewith, And by the Sheriffs return that Bell and his wife were *Terr-Tenants*, the finding by the Jury, after the death of Bell, is void, and so the issue not tryed, the Judgement is erroneous: Therefore he conceived, That the Plaintiff may well assigne it for error, and take advantage thereof. But Rolls for the Defendant in the Writ of Error shewed, That for as much as there be two severall Scire facias into severall Counties, They be as severall suits, the one not depending upon the other, And the proceedings are severall: And although there be death, &c. alledged in the one, yet it is not materiall, as to the other Suit; Nor is there any cause that the other, against whom the Verdict is found, should assigne it for Error, And he cited for this point, 5 Ed. 4. 7. And of that opinion was Bramston, Jones, and my self: For although Bell be dead, it is not material to Aungell, especially as it is found by this Verdict, That Bell was not Tenant. So the Court is ascertained, That he was not Tenant, although by death the Verdict be void. Whereupon Rule was given, That the Judgement should be affirmed.

Mounson versus Bourn.

20. **E**rror of a Judgement in the Common Bench, in Debt, by William Bourn, against Sir William Mounson and Margaret his wife, Executrix of Charles Ezle of Nottingham for 200 l. The Defendants appeared and Judgement against them of Debt, and four pounds costs *de bonis Testatoris*, &c. *Et si*, &c. *tunc de bonis propriis* for the four pounds for costs. This being in London, a Fieri facias was awarded to the Sheriffs of London, who returned *Nulla bona Testatoris*, and for the four pounds, *Nulla bona*. The Plaintiff afterwards upon a Testatum that goods were sold and *esloyned*, procured a new Fieri facias, reciting the Judgement and the former Writ and return thereof, *Et quod Testa-*
tum



tum existit, That they had goods sufficient, and had *esloyned* and sold them; Wherefore the Sheriffs of London were commanded, That they by Enquisition, vel alio modo quovislibet quo constare poterit, should enquire if they had sold or *esloyned* the said Goods: And if it were so found, Quod scire faciant to the said Sir William Mounson & Margaret his wife that they be in Court in octab. Mich. to answer thereto. Hereupon the Sheriff returned an Enquisition, finding the sale and *esloyned* of the said Goods, and that they scire fecerunt, &c. And the parties appeared and demurred upon the Writ. And the Court, after divers adjournments, adjudged the Writ good, and that the Defendants should answer: Whereupon they imparle: And afterwards Judgement was given by Nihil dicat. That the Plaintiff should have Execution de bonis suis propriis. Upon this a Writ of Error was brought, Tam in redditione Judicii quam in redditione Executionis. And Taylor for the Plaintiff assigned Error in the Judgement, because it was Quod recuperet the damages de bonis propriis, si non habeant bona Testatoris, where they appeared the first day upon the Summons: And Judgement given the same Term upon a Nihil dicit, where they ought to have had Judgement de bonis Testatoris: And for that purpose he cited 21 H. 6. 13. 33 H. 6. 23. & 34 H. 6. 27. Sed non allocatur; Because it is not the confession, but the delay which is the cause the Plaintiff shall recover damages de bonis propriis. Secondly, Whereas it was objected, that the Judgement being de bonis propriis against the Feme, And in Law a Feme covert hath not any goods; therefore the Judgement should be void, It was resolved, That the Judgement was well given; For the Baron being only charged in right of his Feme, The Judgement shall be against both; And she may have Goods, As a Term or a Chattel reall before the Coverture: Also she may have Goods after her husbands decease. Thirdly, That a Devastavit may well be by a Feme by *esloyning* the Goods: As a Feme covert may doe a Tort, and be punished for it. Also this was a Devastavit by the Feme when she was sole. And it was held that if a man takes an Executrix to Wife, and waste the Goods, it is a devastavit in the Feme: For it was her folly to take such an husband who would make a devastavit. And Jones said, If there be a recovery against Baron and Feme upon a Devastavit, if the Baron survive the Feme, he shall be charged; also if the Feme survive, she shall be charged: But if the Recovery be not against Baron and Feme, in the life of the Feme, and she dies, the Baron shall not be charged: Whereunto Brampton agreed. And for the principall matter I delivered my opinion, That this Writ is good, & the Judgement good, as this case is: For they being returned warned, and appearing and demurring upon the Writ, which being adjudged good (as well it may, being a judiciall Writ and framed by the discretion of the Court,) and the party being warned and not pleading, or traversing the Devastavit (as he well might) There is great reason, Judgement should be entred against them; For it was their folly they

they would not plead : And it is out of the mischief put in Pettifers Case, Cok. lib. 5. fol. 32. Wherefore, &c. Jones and Brampton would not deliver any opinion in the first point, but would advise, Berkeley was absent and in Chancery. Vide plus postea, fol. 526.

Tho. Morrice and others *versus* Prince.

21. **E**Rror by Tho. Morrice and Elizabeth his wife, against Thomas Middleton, James Palmer, John Lewis, Evans Potham, J.S. and T.D. of a Judgement given against them in an Assise, in the County of Montgomery, to their damage, &c. Upon this the Record was certified, That the Assise was brought 5 Maii, 10. Car. against the said six Defendants, and Charles Vaughan & Margaret his wife, Sir Peter Mutton, and six others (in all fifteen persons) That the Assise was de libero tenemento suo in Brentdaine, and in five other Villages within the said County. The said fifteen Defendants being returned attached, the Plaintiff makes his Pleint to be disseized of his Freehold, viz. of 20 l. rent issuing out of fourty Messuages, one thousand acres of Land, fifty acres of Meadow, &c. in the said Villages, within thirty yeares, &c. And for title he saith, That one Edward Prince Esquire was seized in Fee of the tenements aforesaid, in the Villages, &c. and held them in Socage : And by his Will in witing, 20. Decemb. anno 1 Jac. devised to the Plaintiff a rent of twenty pounds per annum, issuing out of the said tenements, for his life. And afterward the said Edward died seized, and the said tenements descended to the said Elizabeth (who afterwards was married to the said Thomas Morrice) and to the said Margaret (who was after married to the said Charles Vaughan :) And that the Plaintiff was seized of the said rent by the hands of the said Thomas Morrice, being seized of the Freehold of the said tenements in right of the said Elizabeth, in forma predicta, until by the said John Morrice and Elizabeth and the other thirteen Defendants he was disseized ; And thereupon brought this Assise. The said Charles Vaughan and Margaret, and nine others of the Defendants made default ; wherefore the Assise was awarded against them by default. Four other of the Defendants, viz Tho. Morrice and Elizabeth his wife, Thomas Middleton and James Palmer pleaded, That they were Tenants of an acre, parcel of the Tenements, put in view, and that Roger Palmer and William Hewks were Tenants of the Freehold of a Messuage and four acres of Land put in view, &c. who be not named in the Writ ; for which they demand Judgement of the Writ. And if, &c. the Jury finde, that Roger Palmer and Will. Hewks were not Tenants, &c. And that the Plaintiff was seized by the hands of the said Thomas Morrice, pro ut : And that the Plaintiff demanded of the said Thomas Morrice and his Wife, Thomas Middleton, James Palmer, John Lewis, and Evans

Evans Potham, the said Rent; and that they denyed to pay it: And so they disseised him of the said rent, & found arrearages for thirty yeares and an half. And for the other nine, they find, That they did not disseize. And hereupon Judgement was for the Plaintiff against six: And for the nine, *Quod alerant sans jour*. Upon this, Error was brought and assigned principally, because he demanded rent by a devise; whereof arrearages are found for thirty yeares: And it doth not appear when the Devisor died, nor any time or feast appointed for the payment; and therefore the Verdict is clearly ill, because the time of the Divisor's death not appearing, the certainty of the arrearages cannot be known. The second question was, If the Jury, finding a seisin by the hands of one of the husbands of the said heirs, whereas the Land descended to two daughters, Whether this were a sufficient finding of the seisin? And resolved, That it was: As seisin given by one Joyntenant, &c. The third question was, If the Jury finding the demand of the rent from six of the Defendants, and their denyall of payment; and not finding, That it was demanded upon the Land (but, that they so disseised the Plaintiff) Whether that were sufficient? For it was held by all the Justices, That the demanding it of their persons off the Land, and their denyall is not sufficient: For it ought to be upon the Land. But this being upon a Verdict in an Assise, I held, That the Court shall intend it was a demand upon the Land, as 33 Ed. 2. title Verdict 40. & Cok. lib. 9. But Brampton, Jones, and Berkeley held, That it shall not be so intended; And the Judgement was reversed, because it was not found when the Devisor died.

Lee versus Boothby.

UPON evidence to a Jury at the Barre for a Copyhold, par. 22. cell of the Manor of Earls-Chingford, in the County of Essex. The question was, If a Copyholder in fee surrender to the Lord of the Manor his Copyhold Estate; and the Lord makes a Lease for years of the Manor and of the said Copyhold, by the name of his Tenement called H. Whether it were a determination of the Copyhold? And it was held by all the Justices (absente Brampton) That it was not, Because when he lets the Manor, it is included as a parcell of the Manor: But if he, though he had been but Dominus pro tempore, or for half a year (though by paroll) had made a Lease for years of the Copyhold by it selfe, that had destroyed the Copyhold; for it was the n during that time, severed from the Manor; and so could never afterward be demisable again by Copie: But the manor being demised, includes the Copyhold as parcell of the Manor, and the naming of the Copyhold is surplusage, and it remaines alwaies as parcell of the Manor, and demisable by Copie as it was before.

Quia

Claxton

Claxton *versus* Libourn.

23. **W**Rit of Right in Durham. The Tenant waged Battail, which was accepted, and at the day to be performed. Berkley Justice there, examined the Champions of both parties, whether they were not hired for money? And they confessed they were: Which confession he caused to be recorded, and gave further day to be advised. And by the Kings direction all the Justices were required to deliver their opinions, whether this were cause to de-arraign the Battail by these Champions. And by Brampton chief Justice, Dampont chief Baron, Denham, Hutton, Jones, my self, and other Justices, it was subscribed, That this exception, comming after the Battail gaged, and Champions allowed, and Sureties given to perform it, ought not to be received. Bracton 161.

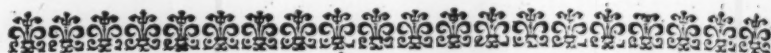
Goodwin *versus* Anne West. Hill. 13 Car. rot. 1321.

24. **D**Ebt, for ten pounds upon the Statute of quinto Elizabethæ. Whereas the Plaintiff, having a Suit in the Common Bench against one Turburlack, in an Action for words; Wherein he shews, That he was a Suitoꝝ to the said Anne West, the now Defendant, to have married her (she being a woman of a good Estate;) And that the then Defendant, to defame him and deprive him of his hopes of the said Marriage, said of the Plaintiff, He hath had a Bastard by one A. S. whereby he was greatly disparaged, and lost the said Marriage. To which the then Defendant pleaded Not guilty: And thereupon a Nisi prius being awarded to be tried at Gloucester the one and twentieth of July following, he sued a Writ of Subpoena out of the Common Bench, directed to the said Anne West, to testifie in the said cause at the said Assises, before the Justices of Nisi prius, upon the said one and twentieth of July; and that the seventeenth day of July decimo quarto Caroli he shewed it to the said Anne West, the now Defendant, and left a Note with her of the day and place of appearance, and delivered unto her twelve pence towards her expences and charges, and promised unto her, if she would come at the said day and place to testifie, &c. he would give her so much more pro expensis & oneribus suis as she would reasonably require; which summe of twelve pence she accepted; And that she did not come ad testificandum, although she was required, whereby the Action passed against him: Whereupon he demanded, according to the Statute, ten pounds, and his further damages by the Court to be taxed. And upon Non debet pleaded, it was found for the Plaintiff. And now Charles Jones moved in arrest of Judgement, first, That the Statute is misrecited: For the Statute is. If Suit be commenced

in aliquibus Curiis, and he recites it in aliqua Curia ; so it varies. Sed non allocatur ; For it is all one in intendment. Secondly, Because he doth not aver, that he said twelve pence was sufficient, otherwise she is not to stir out of her dozes. And of that opinion was Brampton chief Justice, because she is not compellable to come upon promise, without charges delibered. Jones doubted thereof; but Berkeley and my self held it to be good, when she accepted the twelve pence ; and she did not say she would have more for her expences. Thirdly that oneribus is no word for charges. Sed non allocatur ; For being joynd with expences, it shews, that it was intended pro misis. Postea : pag. 540.

U u u 2

Termino



Termino Hillarii, anno decimo quarto *Caroli Regis*,
in Banco Regis.

The Lord Says Case.

1. **A**ction *sur Trover & Conversion*, of three Oxen taken for three pounds five shillings, assessed by the Sheriff of Lincoln upon the Plaintiff, towards finding of a Ship. Upon demurrer at the Barre, Holbourn being ready to argue, Banks Atturney Generall moved, That he might not be permitted to argue any of the matters, contrary to the Judgement in the Exchequer Chamber betwixt the King and Master Hampden, wherein hee said four poynnts were adjudged. First, That the Writ was legal by the Kings Prerogative, or at leastwise by his Regal power. Secondly, That the Sheriff, by himselfe without any Jury, may make the Assessment. Thirdly, That the in-land Countiees ought to do it at their proper charges, and to finde men and victuals out of their Countiees for the time in the Writ mentioned. Fourthly, That the sum assessed was a Duty, and may be leyved. Holbourn offered to argue, That any one, who was not party to the former Judgement given in the Exchequer Chamber, may be permitted to argue against it: But Brampton, Jones and Berkeley (the Writ being allowed to be legal) said, That such a Judgement ought to stand, until it were reversed in Parliament. And none ought to be suffered to dispute against it. Note, That the resolution in Mr. Hampdens Case was adjudged to be against Law and repealed by the statute of 17 Car. vide Inst. pag. 601.

Edwards *versus* Rogers. Trin. 11 Car.

2. **T**Respasse. Upon Not guilty, and a speciall Verdict, the Case was. Tenant for life, Reversion to William Rogers, an Ideot, in Fee: Andrew Rogers his Uncle levies a Fine come ceo, &c. with proclamation to Robert Crompton; And had issue John, who had issue William the Defendant, and died. William the Ideot dyed without issue, William the Defendant enters as heir unto him, viz. sonne and heir of John, sonne and heir of the said Andrew. And whether he may claim against this fine of his Grandfather (not claiming by the Grandfather, but deriving only his Pedegree from him) was the question? And it was argued by Rolls for the Plaintiff, that for as much as William Rogers is heir to Andrew his Grandfather, uncle to the said William the Ideot, he is estopped to claim against this fine, or to say, Quod partes ad finem nihil habuerunt. And for proof thereof, he relied upon the Statute 27 Ed. 1.

of

of Fine, and 8 H. 4. 9. 40 Ed. 3. 9. 2 Ed. 3. 10. 17 Ed. 3. 54. 2 Ed. 3. 6. 19 H. 8. 7 Co. lib. 3. fol. 89. 18 Ed. 3. 41. 11 H. 7. 12. 10 Car. Scovell and Brastocks Case in this Court, Cok. lib. 3. fol. 50. Sir George Browns case, and Saule and Clerks Case. But it was argued by Farrer for the Defendant, That this fine shall not barre, Because he claims not any interest by or from Andrew, nor as he is unto him, but only makes mention of him in the pedigree: And he relied upon Hobbes Case in the Exchequer, cited in Cok. Littleton fol. 8. 2 Ed. 3. 6. & 10. 17 Ed. 3. 54. 38 Ed. 3. 11. Cok. lib. 8. fol. 53. Symms Case, 36 Ed. 3. title View 30. *in sur cui in vita*, 33 H. 6. 18 15 Ed. 4. title Entry Congeable 51. 39. H. 6. *de Fessment del firs in vie son peir*: And that here he is in quasi of another Title, and puiſny to the fine. Vid. Dyer 277. Vide plus postea. Pag 543.

Whyte *versus* Hanbye. Pasch. 14 Car. rot. 465.

ERROR of a Judgement in the Common Bench, in an action of 3.
Trover & Conversion of goods. The Writ suppoſeth, That such a day, apud Alſton in Comit. Suff. he was poſſeſſed, &c. and loſt them; and the Defendant found them, and converted them to his own uſe; and in the Count he ſheweth the *Trover & Conversion* to be at Alſton aforeſaid: And the Error was aſſigned, becauſe the place of *Conversion* was not ſhewn in the Writ. And now Maynard for the Plaintiff, in the Writ of Error, argued, That the place of *Conversion* ought to be ſhewn in the Writ, for it being an Action upon the Caſe, the Count otherwiſe is not good; and for that purpoſe vouched 3 Hen. 6. 48. Ed. 3. 6. Berkeley and my ſelf being only in Court, held, That the Writ was good enough: For the poſſeſſion ſuppoſed to be at Alſton, and the loſſe *Trover & Conversion*, being all conjoyned with a Copulative, ſhall be intended all in one place, viz. at Alſton, eſpecially the Count mentioning the *Conversion* to be at Alſton, and the Iſſue there tried, and Verdict given: But Berkeley ſaid, If the Writ be diſſiſious for this cauſe, it is not aided by the Verdict: But we both agreed, That as this caſe is, the Writ is good; Whereupon Rule was given, That Judgement ſhould be affirmed, unleſs, &c.

Aſcoughs Caſe in the Court of Wards.

THIS Caſe was referred by the Kings command unto the Juſtices 4.
of the Kings Bench, to certiſie their opinion, which was thus. One Aſcough, ſeized in fee of the Manor of D. holden by Knight ſervice *in Capite*, deviſeth the ſaid Manor, to be ſold by his Executors, part of the money to be paid to his Wiſe, and part in divers other Legacies, the reſidue to be beſtowed in charitable uſes, viz. for the marrying of poor Maidens, and relief of Priſoners, &c. The firſt Queſtion was, Whether this were a good Deviſe to binde the King, and to barr him of his primer Seiſin by the Statute of 43 Elizab. of charitable

charitable Uses? And all the Justices held cleerly, This shall not barr the King for his interest of Wardship, Livery, or primer Siefin, because generall words where the King is not named, shall never bind or barr him. The second Question was, Whether such a Devise by the said Statute, be good against him for the whole, and shall barr the Heir to claim a third part? And they all resolved admitting it to be a Conveyance within the Statute, yet it is void against the Heir for the third part; For by the Statute of 32 & 34 Hen. 8. he hath no power to dispose but of two parts; so for the third part it is cleerly void. The third Question was, Whether this were a Conveyance within the Statute of 43 Elizab. Because here is not any disposition of the Land to charitable uses, but an appointment, That the Land shall be sold, and the money divided, part to his Wife (who is cleerly out of the Statute,) another part to satisfie divers Legacies, and the residue, which in truth was the greatest part, to the said charitable uses? But as to this, they all resolved not.

Gybbs *versus* Wybourn.

5. **P**ROhibition. For that the Defendant libel'd in the spirituall Court for Tythes of young Trees planted in a Nurcery, upon purpose to be rooted up and sold to be planted in other Parishes. Upon demurrer the Question was, Whether Tythes shall be paid for them? For Rolls for the Plaintiff argued, That they were of the nature of the Land, and Tythes shall not be paid of them, no more than of Mines of Coal or Stone digged, or for Trees or Wood spent in hedging, or Fuel in the house, wherein Husbandry is maintained. But Maynard argued, that for as much as he made a profit by such young Trees, it is reason Tythes should be paid for them when he diggs them up and sels them in another Parish, as well as of Corn, or Carret-roots or such things. And of this opinion was all the Court; whereupon a Consultation was awarded.

The Lord Mounson and his Wife *versus* Bourn. Cujus principium ante pag. 518.

6. **VV**As now argued openly at the Bench by Jones and Berkeley for the defendants in the Writ of Error, That the Judgement ought to be affirmed: And Berkeley argued, First that there being no Error assigned in the principall Judgement, it is therefore to be affirmed. The Error assigned was in redditione Executionis, because the Scire facias in the said Writ was, Si constare poterit per Inquisitionem, vel alio modo, that they had wasted the goods, Quod scire faciant eis ad respondendum to the said Devastavit, and shew cause wherefore Execution should not be awarded of their proper goods, which being a Judiciall Writ, may be well framed, as the Court shall appoint; For as the Register is the Rule for

for Writts originall, whereby they are framed (which is confirmed by Act of Parliament) and there ought not to be any variance from them, but by authority of Parliament, as the Statute of West. 1. cap. saith: So for Iudiciall Writts, they may be framed according to the discretion and direction of the Court: And for this cause these Writts have been usually granted in the Common Bench, and frequently used after 9 Hen. 6. as appears by the said Book fol. 57. and therefore we ought to adjudge it to be the Law in the same Court, and not to adjudge the contrary, as in Cok. lib.

Wiscots Case. Ejectione firmæ of a Lease by Baron and Feme; And he doth not shew, That it was by Deed (and without Deed it is cleer it is not the Lease of the Feme) Yet because it is usuall in the said Court, to omit the mentioning of the Deed; it shall be intended to be by Deed; and the presidents of the Court warrant such declarations, therefore it was adjudged to be good: So Cok. lib. 4. fol. 92. Slades Case, adjudged by reason of the multitude of presidents in the Kings Bench, That an Action upon the Case may be maintainable, where he might have had an Action of Debt, and that the common course had been to have Debt untill then, and some had been referred for this cause; yet being argued in the Exchequer Chamber, and there made apparent by the presidents in the Kings Bench, That such actions were allowed in the Kings Bench, it was adjudged, That it ought to be taken for Law: And so it had been used since in the Common Bench; yet no presidents were shewn before the time of Hen. 6. So here the Presidents and Judgements in the Common Bench, warranting this course, it is to be taken now, as the Law of the Court, and to be allowed. And to answer to Pettifers Case, Co lib. 5. fol. 32. he said, There was great difference betwixt the said Cases; For there the inconvenience was, because the Judgement was by default upon two Nihilis returned; but here they be returned, warned, and appeared, and they might have traversed the Enquisition, and taken Issue thereupon, That they had not made any devastation. And for the Case cited 12 Ed. 3. tit Execut. 9. it is an harder Case than this; for there, upon a Fieri facias, was returned Nulla bona; and upon a Testatum, That they had goods and wasted them, the Sheriff was commanded, That he should enquire thereof; and if he found they had wasted, he should make Execution de bonis propriis; So without any other warning, he was to take their proper goods in Execution: Yet he conceived, That in such Case, if the Sheriff had done so, he was not chargeable in an Action upon the Case, because he did it by the Courts command: But in this case the Court was more favourable, to have an Enquisition before, and not immediately to make execution, but to warn the parties to shew cause wherefore he should not have execution. And when they appeared, and would not answer, but suffered it to pass by nihil dicit, it is quasi a confession thereof, and therefore good reason they should be charged de bonis propriis; wherefore he concluded, that

That there is no Error, either in the Judgement or Execution; And that they should be affirmed. Jones argued to the same purpose, That the Custome and Presidents in all Courts are the Law in the same Court, and constant judicall proceedings are to be accounted Law; and therefore in the Common Bench it is the usuall Course, to have but one Scire facias to have Execution, which being returned Nihil, the party is to have Execution. But in the Kings Bench the usuall course is to have two Scire facias's: And if Execution be taken upon one Scire facias awarded, and Nihil returned, it is Error, and therefore may be reversed, because it is contrary to the course of the Court: And this Case differs from the reasons and mischief in Petifers Case, Because the returne here is, That they were warned and made default, and would not plead; whereupon he concluded also, That the Judgement and Execution should be affirmed. Brampton chief Justice argued the same way, That as this Case is, it should be affirmed; For it is no inconvenience here to the parties, or to the Sheriff, when the Sheriff takes an Enquisition which finds a Devastavit, and the party is warned and appears, and demurres thereupon, so that he takes notice of the Writ: And the common course & presidents of the Court are the Law of the Court, and one Court ought to take notice of the customes and courses of other Courts, as it is held 6 Ed. 4. 1. 11 Ed. 4. 1. and Co. lib 2 fol. 16. Lanes Case, which is a stronger Case than this; For there it is, That a Lease under the Erchequer Seal, is as well allowable & pleadable in this Court, as if it had been under the great Seal: And although regularly a freehold cannot pass but under the great Seal, yet in regard of the usuall course of the Erchequer Seal, and multitude of presidents there, (of which course the Common Bench ought to take notice) and for the inconvenience whereby many Subjects should be otherwise prejudiced, it was adjudged good and allowable there, a multo fortiore here, because this course of awarding those Writs hath been continued in this Court ever since 9 Hen. 6. and therefore there is great reason they should be now allowed. And for the mischief alledged, That the party should be concluded by this Enquest of Office, it was said, there was not any mischief; For it was agreed by all of us, That he may contradict it upon his apparance, and traverse it; and when he is warned, and will not answer, it is quasi a confession that it is true; and it was his fault he would not traverse it. And where it was said, That it may be taken by default, upon two Nihils returned and so he should be prejudiced, I thereto answered, There was not any mischief; for if it should be false, he might have an Audita querela, and so help himselfe, as Fizth. N. B. fol. 104. And so we concluded, That the Judgement and Execution should be affirmed, and gave a Rule to the Prothonotaries, That such course of Writs should be here used, as consonant to Law and Justice.

Smith *versus* Risley and others. Trin. 14 Car. rot.

Ejectione firmæ. Upon a speciall Verdict the Case was, Paul Risley was seised in fee of the Lands in question, and by Indenture betwixt him and Sir Thomas Denton, Sir Alexander Denton, Thomas Risley his brother, and William Withers covenanted and agreed with them, That for the favour and affection which he did bear to his wife and children in that Indenture mentioned, and for the better maintenance, livelyhood, and preferment of them, and to the intent to settle the Lands, Tenements, and Hereditaments hereafter mentioned in the name and blood of the said *Paul Risley*; he did thereby covenant for him, his Heirs, and Assignes, to and with the said four parties and their Heirs, That he the said *Paul Risley* and his Heirs shall at all times from henceforth stand and be seised of the said Tenements (in the Declaration mentioned) to the use of the said *Paul Risley* for term of his life, without impeachment of Waste; and after his decease, to the use of *Dorothy* his Wife, for term of her life; and after her decease, to the use of the said Covenantes and their Heirs. Nevertheless, upon speciall trust and confidence, That they shall make Leases and Estates thereof, or of any part thereof, as the said *Paul Risley* shall appoint by any his Deed, &c. And in case that he make not any such appointment, then the said Covenantes and their Heirs shall levy out of the Rents, Issues, and Profits thereof, for his younger Children hereafter named, viz. *Crescens*, *Peter*, and *Paul* his younger Sunnes, and for *Mary*, *Dorothy*, and *Elizabeth*, his three Daughters, two hundred pound a piece: The Daughters Portions to be paid at their respective ages of twenty yeares, and the Sons Portions at their respective ages of twenty four yeares, and that the said Covenantes and their Heirs shall pay, allow, and give out of the Rents, Issues and Profits to every of the three Sons and three Daughters, such reasonable maintenance as they shall appoint; and after the decease of the said *Paul Risley* and *Dorothy* his Wife, and the said Portions levied, then to the use of *Thomas Risley* second Son of the said *Paul Risley* (the now Defendant) and the Heirs of his body; And for want of such Issue, then to the said *Crescens* and the Heirs of his body (and so to his other Sons, and then to the use of his Daughters and the Heirs of their bodies;) And for want of such Issue, to the use of the right Heirs of the said Daughters for ever. The Jury finding that quinto Septembris, secundo Caroli, Paul Risley died, and that Dorothy his Wife survived him, and entred, and was seised, prout Lex, &c. And that afterwards, viz. 12 Septemb. 2 Car. Sir Thomas Denton and the other three Covenantes by Indenture, inrolled within six moneths, in the Chancery, bargained and sold to the said Thomas Risley the Brother the said Tenements, habendum to him and his Heirs of his body, to the intent he should perform the trusts in the said first Indenture mentioned, the Remainder over,

as is limited in the first Indenture. They finde, That Mary, one of the daughters attained to the age of twenty yeares, in the life of the said Paul Risley; And that Dorothy, another of the daughters, attained to the age of twenty yeares, after the death of the said Paul Risley, in the life of her Mother; And that none of their portions were paid; And that William Risley (the Lessor of the Plaintiff) sonne and heir of the said Paul Risley entred, and made this Lease, and the Defendants *ousted* him. Et si super totam materiam, &c. the Defendants be guilty, they pray the discretion, &c. And it was argued divers times at the Barr by Ward and Holbourn for the Plaintiff, and by Porter and Grimston for the Defendants. And it was said for the Plaintiff, That this Deed raised no uses, Because all the four Covenantees besides Thomas Risley the brother, are strangers in blood to the covenantors: And that Thomas Risley the brother, although he were named brother, was named for distinction only betwixt him and Thomas Risley the sonne, and not for the consideration of blood to raise a use to him; And the intention was to settle an use in them four, for performance of the Truths mentioned in the Deed, and for settling the uses in them all, or else in none of them; And none of the considerations in the Deed extend to Thomas the brother, nor is intended for his benefit; and so none of them can raise a use in him. For the first consideration is, for the preferment of his wife; The second, for the preferment of his Children; The third, to raise portions for the use and benefit of his Children; and there is not any benefit or profit mentioned to the brother, or his children: And if a use should be raised out of the residue, it is upon a contingency, viz. after payment of the portion; And it now appears, that they are not paid, nor can be paid, because the one daughter came to her age of twenty yeares before the death of her father, the other daughter before the death of her mother. But all the Court resolved, That the uses are well raised and vested in Thomas his brother (but not in any other of the three Covenantees) because he is of the blood; And one of the considerations is, For consideration to settle in his blood, which is by the settling in the brother; and although it be not mentioned, That it is in consideration, that he is his brother, yet being his brother, it sufficeth. And it is likewise sufficient, because the brother is to take Estate to raise Portions to his Nephews and Nieces, and also to settle Estates upon them, according to his appointment. And here is not any contingent use, but only a trust and confidence in the Covenantee to execute the Estate to his Children. But no Estate is in the Children by any Estate limited unto them. Then when all the other Covenantees joyn in a bargain and Sale to Thomas the younger sonne, he hath a good Estate: Whereupon by the whole Court it was adjudged for the Defendant.

Cook versus Cook. 14. Car. rot. 1446.

ERror of a Judgement in Waste. The Error assigned was, 8.
Because the Plaintiff declares, That the Defendant fecit va-
stum in a Closse in succidendo three Oaks, Ashes, and six Black-
thorn-trees growing, &c. The Jury found the waste in succidendo
three Oaks, three Ashes, and six Blackthorn-trees, existentes arbo-
res Maeremii and found damages joyntly for them all. And Mal-
let moved, That it was Error; For Blackthorn-trees, cannot be
tyrber, nor is there any Waste lies for them, unless they be grow-
ing in hedges, which ought to be specially shewn; therefore the
giving of entire damages was erroneous: And it is apparent, that
Blackthorn-trees be not accounted tyrber, where there be other
tyrber trees growing in the same Closse, as 46. Ed. 3. 9 H. 6. 10.
65 & 67. But the Court (absente Berkeley) agreed, That it is no
Error: For Blackthorne in some Countreies may be accounted
tyrber; and being averred in the Declaration to be tyrber, and
the issue found by the Verdict, it is not to be doubted but that it is
tyrber: wherefore the Judgement was affirmed.

Powell versus Sheen.

Prohibition was prayed, to the Councell of the Marches of
Wales: For that upon a Bill there, for a supposed Ryot and
Battery, to the Plaintiffs damage of a thousand pounds, they pro-
ceeded and gave sentence against the Defendant, and awarded one
hundred Marks damages to the Plaintiff; where, by their instru-
ctions, they ought not to hold plea of damages or Debt above fifty
pounds. But Evers the Kings Atturney for the Marches of
Wales answered, That by their new instructions, they may hold any
plea of Ryots or Misdemeanors, as the Star-Chamber may.
But it was thereto replied, That although the Star-Chamber of
late time hath used to decree damages to the party, and the legality
thereof hath not been questioned, being a supreme Court, It doth
not therefore follow, that other Courts may assume unto them-
selves such a Jurisdiction: And although Evers said, That Court is
ordained and established by the Act of 34 H. 8. it was answered,
That the said Act doth not authorize that Court to doe more then
formerly had been used; and whether it were before those times so
used, cannot be shewn: Whereupon it was adjudged, That a
Prohibition should be granted.

Pigot versus Mary Pigot and Elizabeth Lewen. Trin. 14 Car.

Appeal of the death of his father, whose heir he is, against the
Defendants, because that they, videlicet, the said Mary Pi-
got

got proditoriè, & Eliz. Lewen felonice conspired the death of Robert Pigot the Plaintiffs father, and late husband to the said Mary; And for that purpose, the said Mary proditoriè, and the said Elizabeth felonice, ministred unto him such a kind of poyson, in a Posset, which he, not knowing, drank up, and afterward within such a time died; so the said Mary proditoriè, and the said Eliz. felonice, him murdered and killed. They being hereupon arraigned in the Kings Bench, pleaded Not guilty: And a Venire facias was awarded to try them at the Barre in Mich. Term. 14 Car. And after evidence apparent against the said Mary, and doubtfull against the said Elizabeth, the Jury found the said Mary Guilty, and the said Elizabeth Not guilty. And now Charles Jones for the Defendant moved in arrest of Judgement, That there was not any Declaration upon the file in the said Michaelmas Term, as it ought to be. But Maynard for the Plaintiff said, That this appeale was arraigned at the Barre in Trinity Term 14 Car. And the Defendants, being at the Barre, instantly pleaded thereto the same Term; and so it is well enough without other Declaration filed, which is the usuall course in this Court; and that no other Declaration is to be filed. But if they had not pleaded the same Term, or if they had pleaded any other Plea than Not guilty, so as there had been adjourment unto another Term, then the Declaration ought to have been filed. And of that opinion was all the Court: And Hoddesden the Secondary said, That the usuall course was so. A second Exception was taken, Because there was but one Venire facias, where there ought to have been severall Veneri facias's in the Appeal; for they be severall offenders, especially the one being charged with Treason, the other with Felony: and for that purpose vouched the presidents in the old Book of Entries 46. & 47. and in the new Book of Entries 57. Maynard for the Plaintiff thereto answered, That the Plaintiff might take one Venire facias or severall Venire facias's for doubt of challenge; and so is 9 Ed. 4. 27. And of this opinion was all the Court: Whereupon it was adjudged for the Plaintiff, and Judgement was given, That the said Mary should be burnt to death.

James *versus* Tutney. Cujus principium ante pag. 497.

11. **VV**As now argued at the Bench by Justice Berkeley, myself, and Justice Jones, And the sole question was, Whether, as this case is, damages & costs ought to be given unto him, who justifies this distress as Bayliff, being adjudged for him, Or whether the giving of damages and costs be erroneous? And Berkeley argued for the Defendant in the Writ of Error; That the damages and costs were well given, and no Error; For by the Statute of 7 Henry 8. chap. 4. it is expressed, That every Avowant, and every other person or persons that make Avowry, Conufance, or Justification as Bayliff in

in a Replevin or second Deliverance, for any Rent, Custome, or Service, if their Avowry, Conuſance, or Juſtification be found for them, or the Plaintiff barred, ſhall recover coſts and damages, as the party ſhould have done if they had recovered. And he conceived, that by the expreſs words of the Statute he ought to have his damages and coſts; For he is within the word Cuſtomes; for he diſtrained for a duty demanded, grounded upon a cuſtome; and if not, yet eſpecially he is within the intent and equity of the Statute: For in ſtatutes, although particulars be enumerated, yet it excludes not, but that whatſoever is within the ſame reaſon and equity, ſhall be taken to be within the Statute. As the ſtatute of Weſtmin. 2. de donis Conditionalibus, expreſſeth divers kinds, yet other gifts not mentioned are within the ſaid Statute: So the Statute 27 Hen. 8. of Joyntures, enumerates divers particular Eſtates, which are Joyntures; yet in Cok. lib. 4. fol. 1. Vernons Caſe, other Eſtates within the ſame reaſon are within the Statute: Alſo in the Expoſition of Statutes, when the words make proviſion for certain perſons, yet they ſhall be extended by equity unto others. As the Statute of Bigamie, and the Statute of 23 H. 8. of Coſts, be expounded larger than the words. So Plowd. Comment. Patridges Caſe, Leaſe for years is within the Statute of Champarty, and the Book of 19 Hen. 8. 11. is expreſs, That the Defendant ſhall recover damages upon Demurrers, yet it is out of the words, and here as this caſe is, a diſtreſs being for a cuſtome duty, he conceived, That damages and coſts are recoverable, as well by the Statute of 7 Hen. 8. as by the Statute of 21 Hen. 8. cap. 9. which adds, That the Avowant for damage *ſeſant* ſhall have coſts: But he held, That if the Lord avowes for relief, or pro valore Maritagii, as he may, yet that is out of the Statute; for they be not Services and Cuſtoms, but Flowers or Fruits ſaln from them; and therefore they be out of the Statute. And he cited for this 26 Hen. 8. 8. and an Avowry for an Amercement in a Leet is out of the Statute, becauſe it is not grounded upon Cuſtome; and for proof thereof he cited Co. lib. 5. fol. 78. Greys Caſe, and Co. lib. 8. fol. 38. Greilleys Caſe. Whereupon he concluded, That Judgement ſhould be affirmed. And the ſame day I argued the ſame way; For this being a generall Statute, ought to be taken liberally to remedy the generall miſchief, which was at the Common Law, That the Avowant diſtraining juſtly, ſhould be at the charge to defend his Act in diſtraining, and ſhould not be allowed coſts nor damages, to the incouragement of thoſe who tortiouſly denyed their duties, ſuing out Replevins meerly for veration ſake, and in diſcouragement of thoſe who diſtrained, who by the Common Law had neither coſts nor damages allowed them for their lawfull diſtreſſes; wherefore to remedy this miſchief were the Statutes of 7 H. 8. cap. 4. and of 21 H. 8. cap. 19. made, which ought liberally to be conſtrued for advancing the remedy, and ſuppreſſing the miſchief, as Cok. lib. 3. fol. 7. in Heydons Caſe: And it ſhall be conſtrued

strued according to the intent of the Makers, which intended by
 7 Hen. 8. cap. 4. to give costs to the defendant where he prevailed,
 as the Plaintiff should have had, if he had recovered; and although
 they mention Rents, Customs, and Services only, and the Pre-
 amble extends only to those Rents, Customs, and Services which
 lie in Tenure; yet the second part, whereupon this opinion is ground-
 ed, is not such Rents, &c. referring to the Preamble, but all
 Rents, Customs, and Services: So all manner of Customs and
 Services are within the intent of the Statute. And I conceived
 the cases concerning distresses for Relief valore Maritagii, and for
 Imbecilements in Leets, to be likewise within the Services of 7
 Hen. 8. & 21 Hen. 8. because they be in nature of Services, and
 to be expounded as distresses for Customs and Services; and
 therefore in the Case of Sheppard and Mackworth, which was in
 Term. Mich. 44 & 45 Eliz. Where the Bayliff of the Lord Berke-
 ley distrained for relief: The Question was, Because the Land
 had been in Ward to the Queen, by reason of other Lands held
 of her Majesty by Service in Capite, whether the Heir should pay
 relief to other Lands at his full age? And adjudged, That he
 should: There damages were given by the Jury to the Avowant:
 And although Popham advised, because it was a new Case, That
 the Avowant should take his Judgement for the relief, and release
 the damages, which he did; yet that doth not prove that no dama-
 ges were due, but that it was doubted only, and there is not any
 resolution nor opinion to the contrary in that case: vide the new
 Book of Entries, fol. 570 & fol. 573. and Eivellys Case, Cok. 8 Rep.
 fol. 38. And all the Presidents are that damages and costs have
 been allowed unto the Avowants, in such cases. And therefore I con-
 cluded, That Judgement should be affirmed. Jones argued to the
 contrary; and said, we are here upon the exposition of Statutes;
 and multitude of Presidents will not serve for the exposition of
 Statutes, unless after debate in Court they be mentioned to have
 been so adjudged: But no such President hath been shewn, but a
 multitude which have passed sub silentio without debate. And for
 the matter he held, That it was out of the words and intent of the
 Statute; For the first part of the Statute is, Where a distress is
 for Rents, Customs, or Services in Lands, &c. That the Avowry
 shall be upon the Land; So that extends only to such Rents,
 Customs, and Services by which the Land is held; and the se-
 cond part of the Statute of 21 Hen. 8. (which is quasi an expositi-
 on of the former) is, That in such Avowry for any Rents, Customs,
 and Services, those words are to be applied to former Rents, Cu-
 stoms, & Services; And although the words be generall, & say not,
 such Rents, Customs, & Services, yet it is to be applied to the former.
 And where the Statute 21 Hen. 8. cap. 19. intends further remedy
 than was before, it is by express words, upon distresses for Damage-
 feasant and other Rents, which extend to Rent charges, but no men-
 tion of Distresses or Avowry for any other cause: And in Cok. lib.

3 fol. 1. Marq. of Winch. Case. A Case is cited upon the Statute of 9 Rich. 2. of a Writ of Error, Where, upon a Recovery against Tenant for life, it was held, It should not extend to other Estates; and the Statute of quarto Jac. which saith, That no costs shall be given in other causes then such as are within the Statute of 23 Hen. 8. shewes, That without an Act of Parliament, costs shall not be given in other causes; And for the Case cited here in an Abowry, for a Relief, damages were given, and for doubt of error released by the Abowant, it doth appeare of Recoꝝd that they were released; therefore it shall be intended they were disallowed by directions of the Court: And for the cases of damages and costs given in Abowry for Amercements in Leets, he knew, That anno 35 E'iz. in an Abowry for an Amercement in Leet, damages and costs being given, Judgement was reversed for that cause in this Court; Therefore he concluded, That Judgement should be reversed: Note, in his Argument he said, that in the Lord Sayes Case it was adjudged, Scandalum Magnatum was out of the Statute of 21 Jac. of Limitation of Actions upon the Case, and out of the Statute of 27 Elizab. of Errors in the Exchequer Chamber, because not mentioned, although it be included in the words, Actions upon the Case.

Termino Paschæ, anno decimo quarto *Caroli*
Regis in Banco Regis.



Memorandum, Upon Saturday the fourth of May 1639. 1.
anno 15 *Caroli Regis*, Serjeant *Reve*, of the County of *Norff.* was sworn one of the Justices of the Common Bench, succeeding Sir *Richard Hutton*, late second Justice of the said Court, who died at *Serjeants Inne* in *Chancery-lane*; He was a grave, learned, pious, and prudent Judge, and of great courage and patience in all his proceedings.

Cooks Cafe.

Cook was indicted for the murder of Marshall. Upon his arraignment pleaded Not guilty, it was found, That the said Marshall was not a Bayliff to the Sheriff of and had several Warrants upon several Capias ad satisfaciend. against the said Cook and his father, directed unto him and other Bayliffs; and that they, by virtue of colour thereof, entred into the said Cook's Stable and out-house, and hid themselves there all night; and at eight of the clock next morning, came to Cooks dwelling house, and called him to open his doozs and suffer them to enter, because they had such Warrants upon such Writs, at the suit of such persons, to arrest him, and willed him to obey them. But the said Cook commanded them to depart, telling them, They should not enter. And thereupon they brake a window, and afterwards came unto the dooz of the said house, and offered to force that open, and brake one of the hinges thereof. Whereupon the said Cook discharged his Musquet at the said Marshall, and stroke him, of which stroke the day following he dyed. And whether upon all this matter he be guilty of Murder or of Manslaughter, was the doubt? And it was now argued by Rolls for Cook, That it was not Murder; For although a Bayliff were slain, yet it was by his own procurement, in doing an unlawful act, viz in breaking the window and dooz, and attempting to enter and serve Process, which is not lawful for a personal dutie, unless in the Kings case: And for that purpose

purpose he cited Co. lib. 5. fol. 91. Seamans Case 13 Ed. 4. And after argument at the Barre, all the Justices, seriatim, delivered their opinions, That it was not Murder, but Manslaughter only; For although he killed a Bayliff, yet he killed him not in duly executing Process: For it is not Murder, unless there be Malicia præcogitata, or Malicia implicita; As to murder one suddainly, or in resistance of an Officer doing his Office; But that last ought to be where he is duly executing his Office, by serving the Process of Law, wherein he is assisted, cum potestate Regis & Legis: But here this Bayliff was slain in doing an unlawful act, in seeking to break open the house to execute Process for a Subject, which he ought not to do by the Law: And although he might have entred if the dooz had been open, and arrested the party, and it had been lawful; yet he ought not to break open the house, for that is not warranted by Law; and especially lying there in the night, and in the morning breaking the window and offering to force the dooz, which is not sufferable; for under colour thereof, one may enter who hath not any such authority; and every one is to defend his own house. Yet they all held, That it was Manslaughter: For he might have resisted him without killing him; And when he saw him and shot voluntarily at him, it was Manslaughter. But Jones said, That it was resolved by the chief Justice and himself, and the Recorder of London, at the last Sessions at New-gate, in the case of one William Levett, who was indicted of the homicide of a woman called Frances Freeman, where it was found by special Verdict, That the said Levett and his wife being in the night in bed and asleep, one Martha Stapleton, their servant, having procured the said Frances Freeman to help her about house-busines, about twelve of the clock at night going to the doozs to let out the said Frances Freeman, conceived she heard theedes at the dooz offering to break them open; whereupon she, in fear, ran to her Master and Mistresse, and informed them she was in doubt, that theeves were breaking open the house dooz. Upon that he arose suddainly and fetched a drawn Rapier. And the said Martha Stapleton, left her Master and Mistresse should see the said Frances Freeman, hid her in the Buttery. And the said Levett and Hellen his wife, coming down, he with his sword searched the entry for the theeves: And she, the said Hellen, espying in the Buttery the said Frances Freeman, whom she knew not, conceiving she had been a thief, crying to her husband in great fear, said unto him, Here they be that would undoe us. Thereupon the said William Levett, not knowing the said Frances to be there in the Buttery, hastily entred therein with his drawn Rapier, and being in the dark and thrusting with his Rapier befoze him, thrust the said Frances under the left breast, giving unto her a mortal wound, whereof she instantly dyed: And whether it were Manslaughter, they prayed the discretion of the Court. And it was resolved, That it was not; for he did it ignorantly without intention of hurt to the said Frances: And it was there so resolved

resolved. But here they held clearly, That it is manslaughter because he seeing and knowing him, shot at him voluntarily, and slew him: whereupon they all resolved, It was not murder, but homicide only. Vide 13 Ed. 4. 9. 18 Ed. 4. 4.

Perkinson *versus* Gilford and others. Hill. 14. Car. rot.

DEbt, against Giliford and others, the Executors of William Collier Esquire, late Sheriff of the County of Dorset, for two and twenty pounds ten shillings. Whereas the Plaintiff had recovered in the Common Bench, against the Executor of William Pawlett, a debt of one hundred pounds, and two and twenty pounds ten shillings for damages, the debt and damages de bonis Testatoris, &c. Et si non, the said two and twenty pounds ten shillings de bonis propriis; and the Record being removed into this Court, the Plaintiff had a Fiery facias directed to the said William Collier, Sheriff of Dorset for the levying of the said two & twenty pounds ten shillings damages of the Goods of the said Executor; and by virtue thereof he levied the said two and twenty pounds ten shillings, and afterwards dyed without paying, &c. whereupon he demanded it of the said Executors, and they had not paid it, per quod Actio accrevit. The Defendants pleaded Non debent, and found against them. And Mallet moved in arrest of Judgement, first, Because the recovery of the said debt of 122l. 10s is in the Common Bench, and the Execution by Fieri facias is in the Kings Bench, and he doth not shew how it came out of the Common Bench into this Court to have Execution. Sed non allocatur; For in the Record it is mentioned, that it is here duly, which shall be intended to be by a Writ of Error, or other due means; and it is not necessary to shew all the circumstances, how it came hither. The second objection, Because it doth not appear that upon the Fieri facias awarded, it was ever returned served here, so as there is no Record to charge him: For if there were any Record appearing that he had levied it, then peradventure he might charge the Sheriff. The third objection, Because he chargeth him in Action of Debt, whereas there was never any such Action brought before; but (if it had appeared by the Record, that the money was levied) he might have had Accompt, or Action upon the Case, or a Scire facias, but never an Action of Debt. The fourth objection, That although the Action lies against the Sheriff himself, yet it lies not against his Executors; For the non payment is a personal wrong, wherewith his Executors are not chargeable, As Debt upon an Escape lies not against a Sheriffs Executors. But Berkeley, Jones and my self (Brampton being absent) agreed, That the Action well lies: For to the second and third objections, the Fieri facias being duly executed, & the money levied by the Sheriff, the Executor of Pawlett the Defendant in the first Action is discharged, and may aver and plead it against any new Execution to be awarded against him, as 21 H. 8. fol.

proves: And the Sheriff is chargeable for the money to him who recovered it. And as it is allowed that he might be chargeable in Accompt, as Mallet said; so it is agreed, he may be chargeable in Debt; For the Plaintiff might have either Debt or Accompt, as appears in 28 H.8. & Cok. lib.4. Slades Case. And as Berkley said, the case is in 1 H.7. That a Collector, by acceptance of a Tally, is chargeable in Debt; so the Sheriff, having levied the money, is chargeable for so much in Debt to him who recovered. And Mallet confessed, That in the Common Bench it was adjudged, Where the Sheriff returned a Fieri feci, Debt lieth against him. And Berkley said it was all one, when he receives the money; for he is then liable, although he returns not the Writ: For his not returning shall not aide nor excuse him. And for the fourth objection, they held, That the Sheriffs Executors are as well chargeable as himself: For as Jones said, There is a diversity, where the Sheriff is chargeable in his life for a personal tort or misfeasance, there his person is only chargeable, and there *Actio moritur cum persona*. But where he is chargeable for levying of money, and not paying it over, That is for a duty; and there, if he dyes, his Executors are chargeable as well as himself; which is the reason, that for an Escape by the Sheriff, his Executors are not chargeable. But there would be great mischief if the Sheriffs Executors should not be liable in this Case; For the Plaintiff had a duty due unto him from the Executors of Pawlett the first Defendant, who paid it to the Sheriff, and thereby was discharged thereof. And if the Plaintiff should not recover it against the Sheriffs Executors, he should be without remedy, which the Law will not suffer: Wherefore they all agreed, That the Action well lay, And rule was given to have Judgement entered, unless, &c.

Goodwin *versus* Anne West, ante pag. 522.

4. **W**As now moved again by Charles Jones in arrest of Judgement, That the Declaration was not good; First, Because he doth not shew, That he left the Writ with the Defendant; for the Statute is, If they be served with Process; and it is no serving of Process when the Writ is not left, although it be read unto the party, and a note left of the cause, place, and day. Sed non allocatur; For Jones, Berkley, and my self held it to be a sufficient serving of the Process within the intent of the Statute, and according to the usual course and practice; For there may be two, three, or four names of Witnesses in one Writ (and so there be usually) and he cannot leave the Writ with every one of them, and it would be very chargeable unto the Subject to have several Writs for every Witness. The second Exception, Because he sheweth that he paid unto her twelve pence for her pains, and promised to pay unto her as much more as she would require, when she came to be a witness at Gloucester, which is not sufficient, according to the Statute; For

For the Statute is, That he shall pay sufficient charges for her travel, according to the distance of the place, and the quality of the person, so to be paid; and the Witness is not bound to accept his promise for the residue. Sed non allocatur; For when it is alledged, That he paid unto her twelve pence, and promised to pay the residue when she came to Gloucester, and she accepted thereof, She is then bound to come, for she hath accepted of his promise for the residue, otherwise she might have refused, & not told him she would accept of his promise. The third Exception, Because the Plaintiff doth not shew, That he is endamaged by her non-appearance, viz. That the Verdict passed against him, or that he was enforced to be nonsuited, or any other grievance; For so is the Statute, That the party grieved shall have his part of the ten pound, and his further damages taxed by the Justices, before whom, &c. But Grimpston for the Plaintiff answered, That the Action being brought only for the ten pounds, and not for further damages, it is well enough; and the ten pounds is due for her non-appearance to the King and the party: But all the Justices held, That the Declaration was ill for this cause; For there ought to be a party grieved by the non-appearance, otherwise there is no cause of forfeiture: And so is the express scope and words of the Statute; Wherefore it was adjudged for the Defendant, absente Brampston.

Bradley versus Clyston.

DEbt, upon an Obligation of 100 l. for not performing of an Arbitrament, where the award was, That the Defendant should acquit and discharge the Plaintiff concerning a Bond of 100 l. wherein the Plaintiff and Defendant were joyntly bound for the payment of 50 l. unto J. S. The Defendant demurred, and now Rolls shews for cause, That the Arbitrament was void, to award, that he should acquit and discharge him of a Bond made unto a Stranger; For it is not in his power to procure a discharge. But the Court held, That the party may well acquit and discharge, &c. if the fifty pounds be payable at a future day, as it is here to be intended it was. A second Exception was taken, Because the submission is, to stand to the award, so as it be made under hand and seal, ready to be delivered to the parties: And he saith, That they made the Arbitrament before the day (viz. such a day) under their hands and seals; and he doth not say ready to be delivered. But all the Court held, It was well enough; For the words be not, And to deliver, but Ready to be delivered: And when it is under hand and seal, it is intended, ready to be delivered; and the Declaration being read, it was *ex pte* sh, That it was ready to be delivered; Whereupon it was adjudged for the Plaintiff.

Daly *versus* Bellamy and others.

6. **A** Taint brought by the Plaintiff in Trespas of Battery: The Verdict was affirmed. And now Maynard moved for the Defendant, upon the Statutes of 21 Hen. 8. & 23 Hen. 8. That the Defendant should have costs, because the Plaintiff, if he had avoided the Verdict by Attaint, should have had costs. But all the Court agreed (absente Brampston) That he shall have no more costs: For if the first Verdict had passed for the Plaintiff, whereby he should have had costs; or if the said Verdict having passed against him, thereupon he had brought this Attaint, and the Jurors had been attainted, he should have had such costs, as he should have had in the first Action, if it had been found for him; but he should not have had more costs in respect of the Attaint. So è converso, where the first Verdict passed for the Defendant, and he had costs, if the Verdict be impeached by Attaint, or be affirmed, he shall have no more costs, but only those which were given upon the first Verdict: And Hoddesdon said the practice of the Court was alwaies so.

Daniel *versus* Count de Hertford. Trin. 14. Car. rot. 543.

7. **E** Rror of a Judgement in the Common Bench, in Trespas, for depasturing his Close with Sheep. The Defendant justifies, Because the Prior of D. was seised in fee of such a great Close in D. and was seized in fee of the Pasturage in the place aforesaid, for all his Sheep *levant* and *couchant* in the said great Close, at all times of the year: The Plaintiff thereupon demurred, and it was there adjudged for the Defendant, and now Maynard for the Plaintiff, in the Writ of Error, assigns for Error the point of the Judgement: First, Because the Defendant intitles the Prior neither by prescription nor grant; and this being a profit *a prender*, in alieno solo, none can entitle himself by the course of the Common Law thereunto, without grant or prescription; & this Pasturage claimed, is but as Common in its nature. Secondly, That this plea is not aided by the Statute of 31 Hen. 8. For that gives nothing to the King, but what the Prior lawfully had; and therefore it ought to be shewn how the Prior was entitled thereto; wherefore, &c. Rolls for the Defendant, in the Writ of Error, said, That the Plea is good; and was so adjudged upon Demurrer in the Common Bench; and that it was a good Plea, although it were pleaded at the Common Law, before the Statute; For this Pasturage claimed for Sheep *levant* & *couchant* upon the Defendants Land, is Common appendant, and cannot be severed from the Soil by grant; and then to make prescription thereto, is not good, as it is 4 Hen. 6. 13. & 8 Ed. 4. And if it were not good at the Common Law, yet the Statute aids it, by pleading, That the Prior was seized thereof in fee, at the day of the dissolution; otherwise it would be very mischievous,

vous, the Priors and other religious persons, at the time of their dissolution, seeking to deface and suppress all their Deeds, and to conceal their Lands and Estates, which they then held: And therefore such generall Averments had been allowed, as it is held in the case of the Archbishop of Canterbury, and in the Case of the Abbot of Strata Marcella, Cok. lib. 9. 24. And to that opinion the Court enclined; but because it was depending upon Demurrer in the Common Bench, they would not hastily proceed; Wherefore day was given untill the next Term.

The Case of Edwards and Rogers, Cujus principium
ante pag. 524.

VVAs now argued by Maynard for the Plaintiff, and by Far- 8.
rer for the Defendant; And Berkeley & my self delivered
our opinions, That this Fine by Andrew, the Uncle of William the
Ideot, who was seized of the Inheritance, (he dying in the life of
William, so as nothing ever attached in him) shall never barre
William the Defendant, who was Grandchild of the said Andrew,
because he claims nothing by or from him, but onely from Wil-
liam the Nephew of Andrew, who survived the said Andrew:
And he makes his title as Heir to the said William, the Nephew
who was last seized, not making therein any mention of Andrew,
as of one from whom he claims, but only as drawing his descent
from him by way of Pedegree, and not by way of Title; And there-
fore it was compared to Hobbes Case, Cok. Lit. fol. Where the
Father is attainted of Felony, having Issue two Sonnes; and the
one of them purchaseth Lands, and dies without Issue, it shall not
barre the other Son to claim, as Heir to his Brother: And the cor-
ruption of blood in the Father shall not hurt him. And Berkeley
compared it to the Case in the tenth of Elizabeth, Dy. 274. Where
there were two Brothers; the eldest hath good cause *del petition*
de droit; the youngest hath Issue a Son, and is attainted of Felony,
and executed. The eldest Son dies without Issue; the Issue of the
younger Son is barred of the Petition, because his blood is cor-
rupt, and he cannot claim but by mentioning his Father, and from
him, &c. But here for as much as he doth not claim, nor derive,
by him, who levied the Fine, we held, he should not be barred
by the Fine: But Jones conceived, That in regard Andrew is
bound, and cannot claim against that Fine, and his Grandchild
cannot claim, but he ought to make mention of him, That he is
also barred: And as his Grandfather, if he had survived, had been
barred; so also shall his Grandchild, who of necessity ought to
mention him; Whereupon it was adjourned.

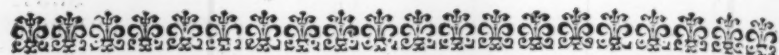
Coopers Case.

9. **C**ooper being endicted in the County of Surrey of the Murder of W. L. in Southwark, with a Spit. He pleaded Not guilty: And upon his Arraignment, it appeared, That the said Cooper, being a Prisoner in the Kings Bench, and lying in the house of one Anne Carricke, who kept a Tavern within the Rules, the said W. L. at one of the Clock in the night, assaulted the said house, and offered to break open the doze, and brake a staple thereof, and swore he would enter the house, and slit the nose of the said Anne Carricke because she was a Bawd, and kept a Bawdy-house. And the said Cooper dissuading him from those courses, and reprehending him, he swore, That if he could enter, he would cut the said Coopers throat: And he brake a Window in a lower room of the house, and thrust his Rapier in at the Window against the said Cooper, who in defence of the house and himselfe, thrust the said W. L. into the eye, of which stroak he died. The Question was, Whether this were within the Statute of 24. Hen. 8. And the opinion of the Court was, That if it were true he brake the house with an intent to commit Burglary, or to kill any therein, and a party within the house (although he be not the Master, but a Lodger or Sojourner therein) kill him, who made the Assault, and intended mischief to any in it, That it is not Felony, but excusable by the said Statute of 24. Hen. 8. which was made in affirmance of the Common Law; wherefore the Jury were appointed to consider of the circumstances of the fact; and they being a Substantiall Jury of Surrey, found the said Cooper not guilty, upon this Enditement; Whereupon he was discharged.

Sir Martin Lyfter *versus* Home.

10. **A**ction *sur Trover & Conversion*, of an Hawk, called a Ramish Faulcon, supposing that he was possessed of that Hawk, ut de bonis propriis, & casualiter amisit, and that she came to the Defendants hand, and he knowing her to be the Plaintiffs Hawk, yet being required, had not delivered her, but converted her to his own use. Upon Not guilty pleaded, and Verdict found for the Plaintiff, Whytlock moved in arrest of Judgement, That the Declaration was not good to maintain this Action, Because he doth not shew, That she was a reclaimed Hawk, and made tame, nor that she had Bells or Clarbells to shew who was her owner: And a Ramish Hawk is properly such an one as liveth inter Ramos and from thence hath its name: And therefore relyed upon the book 14 Eliz. Dyer 306. Sir Richard Fines Case. And Jones and Berkeley inclined to this opinion. But I conceived the Declaration to be good enough, because it is aided by the allegation. That he was possessed of the said Hawk ut de bonis propriis; and that the Defendant,

dant, knowing her to be his Hawk, converted her, &c. And it differs from the Case of Sir Richard Fines: For there, although the said exception was taken to the Court, yet it doth not appear but that the Court was there held to be good enough. But because the Defendants plea was held good, it was adjudged against the Plaintiff; not for the insufficiency of the Court, but upon demurrer upon the plea in barre, which was held sufficient, Vid. Cok. lib. 7. fol. 17. the Case of Swanns, of what Beasts and Birds a man may have property. This Case was after moved again, Termino Hilarii anno decimo quinto Caroli Regis: And then because upon divers former motions the Court was alwaies divided in opinion, the Plaintiff for his greater expedition consented, That Judgement should be entred against him: So the Judgement was entred, Quod nihil capiat per billam. And then the Plaintiff began a new Action in the Common Bench, and amended that fault in his Declaration, and had Judgement by confession of the Action; and only three pound damages given by a London Jury: And thereupon Henden moved in this Court to have costs in his former Action: But because the Verdict was found for the Plaintiff; and upon exception to the Declaration Judgement was given against him, the Court held, That no costs should be given.



Termino Trinitatis, anno decimo quinto Caroli Regis,
in Banco Regis.

Swyft Subchantor, and one of the Vicars Chorall of Litchfeild *versus* Byres and others, Lessees of Sir Edward Peto. Trin. 12 Car. rot.

1. **D**Ebt upon the Statute 2 Ed. 6. for not setting forth the tythes of 140. acres of Land in Chesterton (whereof the said Subchantor and Vicar were proprietors) before they carried away their Corn; For which the Plaintiff demands the treble value, viz. 135 l. Upon Non debet pleaded, it was found by special Verdict, That the Subchantor and Vicars Choral of Litchfeild, being seized in Fee of the Rectory appropriate of Chesterton, within which the said 140 acres of Land lay and were parcell, 29 H. 8. by Indenture, demised and let unto John Peto the tythes of the Rectory for 42 years (with an exception of the priory tythes, the four offering dayes, and the tythes of a Meadow call'd the Parsons Hay, and the presentation to the Vicaridge of Chesterton) rendering 5 l. 16 s. 8 d. And that afterwards by Indenture tripartite, dated 26 Feb. 5 Ed. 6. betwixt the Subchantor and Vicars on the first part, Richard Woodward of the second part, and John Woodward, father of the said Richard Woodward on the third part; reciting the said Lease of 29 H. 8. And that the said John Woodward had bought the said Lease of the said John Peto, they confirmed and ratified the said Lease; And further, for a great summe of money unto them paid, &c. demised and granted to the said Richard Woodward and John Woodward, all the said tythes, with the tyth Hay (except the said priory tythes, and the said four offering dayes, and the presentation of the Clerk, &c.) *habendum* from and after the said term and determination thereof, and the years in the said Indenture comprised, in manner and form following, that is to say, To the said Richard Woodward, for one Moneth after the end and determination of the said term and yeares within the Indenture comprised: and after the said moneth fully determined, To have and to hold the said tythes and premisses (except before excepted) to the said John Woodward, his Heirs and Assignes for ever, rendering 6 l. 4 s. 4 d. *per annum*. And they find, That by virtue of this Grant the tythes renewing of the Tenements in Chesterton aforesaid, had been enjoyned alwaies after this Grant. And further, That afterwards, viz. 23 Martii. 2 & 3 Ph. & Ma. the said Subchantor and Vicars Choral made another indenture, which they find in hæc verba, mentioning, That for divers great sums, to them paid by *Humphry Peto*, and the rent therein afterwards to be

be reserved, they did demise and grant to the said *Humphry Peto*, all that their gleab Lands lying in *Chesterton*, viz. 78. acres of Land, and also the Demeasns of the said seventy eight acres, with all Profits, Commodities, Tythes personall and prediall, whatsoever they be or shall fortune to be, belonging to the said Subchantor and Vicars, as Parsons and Proprietaries of the Parish Church of *Chesterton* aforesaid, as the Tythes of Pig, Goose, Lamb, Wooll, Calf, Fish, Swans, Wood, and all other Tythes whatsoever, and also the Tythes of the said seventy eight acres; all which lately were in the Ferm or occupation of *Margaret Peto*, Widdow, deceased, as also all other their Rights and Interests, Tythes, Commodities, and profits in and to the same, which to them do belong, or appertaining to the Parson or Parsons, and Proprietaries of the Parish Church of *Chesterton* aforesaid (the said yearly Rent hereafter reserved, and the nomination and presentment of the Priest or Curate there, with all offerings and offering dayes, and privie tythes, as well of the Manor-place, as of other the Inhabitants there, alwayes excepted and reserved to them and their Successors for ever) *habendum*, to him and his Heirs for ever, rendering annually to them and their Successors six pounds seventeen shillings four pence. And it is found, That the Tythes of these Lands never were in the Tenure of the said *Margaret Peto*, But they found, That some Tythes and Lands were in the Tenure of the said *Margaret Peto*: And it was found also, That *Sir Edward Peto* is Son and Heir of the said *Humphry Peto*, and that the Defendants were Occupiers of the Lands in the Declaration mentioned, and carried the Cozn growing thereupon without letting out of the Tythes; Et si super, &c. the Court shall adjudg it for the Plaintiffs, They finde for them, and that the Tythes carried away, were worth thirty pounds per annum, and the treble value is ninety pounds; For the residue, they finde for the Defendants. This case was argued at the Barre by the Solicitor Generall, Rolls, and Maynard for the Plaintiff, and by the Attorney Generall, Serjeant Henden, and Grimston for the Defendants: And this Term it was argued at the Bench, and two Questions made; First, Whether the Deed of 5 Ed. 6. be good to convey the Inheritance to John Woodward? Secondly, If the first Indenture be not good, whether the second Indenture of 2 & 3 Ph. & Mar. be sufficient to convey them, against the Subchantor and Vicars, to *Humphry Peto*? For if any of them be good, then the Plaintiffs have no Title. And quoad the first, all the Justices argued for the Plaintiffs, That they have a good Title notwithstanding this Indenture; For this Indenture is meerly void, because it is to convey an Inheritance in futuro; For the moneth is not to begin untill the fourty and two yeares be expired; and it is a grant of Interesse Termini, and no grant of a Reversion; for the Inheritance is granted therein, which was not in Lease before: And as it is an Interesse Termini for the tythe hay, so ought it to be of the residue; for there cannot be fraction of the Estate:

And then being only an Interesse Termini in Richard Woodward, there cannot be a grant of a Remainder or Reversion to commence in futuro: And to prove this, see Cok. lib. 2. fol. 55. Bucklers Case, & 8 Hen. 7. 3. & 38 Hen. 6. 34. The second Question was, Whether the Deed of 2 & 3 Ph. & Mar. be sufficient to convey those Tythes, Because they never were in the Tenure of Margaret Peto; and it was strongly urged for the Plaintiff, That those words in the Indenture were a clause of restriction, and declares their intent, that nothing should pass, but that which was in the Tenure of Margaret Peto. But all the Justices held, That it was a good Grant, and no restriction of the first words; First, Because there be three distinct clauses before, viz. First the grant of the seventy eight acres of gleab; Secondly the grant of the Tythes prediall and personall; Thirdly the grant of the Tythes of the seventy eight acres of gleab Land, which are all distinct severall clauses by themselves. And this clause, All which, &c. doth not depend upon any of them: And Which were, &c. is a restriction only when the clause is generall, and is all but one and the same sentence, and not ended or certain, before the end of the sentence, as in the Cases of 2 Ed. 4. 29. Plow. 391. in Wrothsleys and Adams Case, and Plowd. 395. in the Earl of Leicesters Case, But where the clause is not in one intire sentence, but distinct and dis-joynded from the other, as here it is, there cannot be any restriction: Also this being in the Case of a common person, addition of a false thing (viz. false possession) shall never hurt the grant; For the addition of a falsity shall never hurt where there is any manner of certainty before, Cok. lib. 2. fol. 22. Dodingtons Case, & Dy. 376. Co. 4. 34. Bozooks Case. But in the Kings grants, where there is falsity in point of prejudice to the Kings benefit, or a mis-information of the Kings Title, or upon a false suggestion of the party; there all grants shall be void, as it is Cok. lib. 10. fol. 113. 21 Ed. 4. 48. 8 Hen. 7. 3. 9 Hen. 6. 28. Wherefore they all concluded, That this grant of 2 & 3. Phil. & Mar. was good; and it is to be observed, That although these words, Which were in the Tenure of J. S. when they are in one and the same sentence, may be construed to be a restriction; yet in these words, All which were, &c. this word All so dis-joynded, cannot be a restriction, but an explanation; Wherefore for these and other reasons, it was adjudged to be a good grant against the Plaintiff: But in consideration and commiseration of the poor Vicars, Sir Edward Peto was mooved to add by way of a Rent-charge to their means; And he agreed to the motion of the Court, and added four pounds per annum Rent for their further sustentation, besides the Rents paid unto them.

Crisp versus Pratt. Hill. 10 Car. rot. 73.

Ejectione firmæ of sixteen acres of Pasture in Chipping-Barnett. The Case was, That Ralph Brisco senior in 19 Jac. purchased the Lands in the Declaration mentioned, being Copyhold, parcel of
of

of the Manor of Chipping-Barnett, to him and Margaret his wife, and to Ralph Brisco their sonne, and his heirs; And two years after he became an Inn-keeper, and received all the profits of the Land, untill 4. Aug. 4 Car. at which time he became Debtor by Bond to John Brisco and others, and committed divers Acts (mentioning the Acts) which declared him to be a Bankrupt. And in 5 Car. upon a petition to the Lord Keeper, That the said Ralph Brisco senior was an Innkeeper, and did get his living by buying and selling, and was indepted to divers persons and become a Bankrupt, The Petitioners prayed to have a Commission of Bankrupts, which was granted them: And the Commissioners adjudged him a Bankrupt, and sold this Land to the Lessor of the Plaintiff, for the benefit of the Creditors, by Indenture inrolled; which being shewn to the Lord of the Manor, he admitted him accordingly. And afterwards Ralph Brisco the father died, and the said Margaret dyed; and Ralph Brisco the sonne entred, and the Lessor of the Plaintiff entred upon him, and made a Lease to the Plaintiff for years; and the Defendant, as servant of the said Ralph Brisco the sonne, ousted him. Et si super totam, &c. the Court shall adjudge for the Plaintiff, They finde for the Plaintiff; if otherwise for the Defendant. Upon this matter found, it was argued at the Barre: and this Term at the Bench: And Berkeley argued for the Plaintiff, and Brampton, Jones, and my selfe for the Defendant. The first question was, The Jury finding, that the said Ralph Brisco senior did get his living by buying and selling, using the Trade of an Inn-holder and not otherwise, Whether he be a person who is a Bankrupt, and within the Statutes of 13 Eliz. 1 Jac. & 21 Jac. And Berkeley held, That he was a Bankrupt within those Statutes: For an Inn-holder is one who hath much use of buying and selling, for the entertainment of his Guests, and their horses; and running in debt by this means, it is reason he should be accompted a person within the said Statutes; and so much the rather, because the Jury finde, that he got his living by buying and selling, using the Trade of an Inn-holder. But all the other three Justices argued to the contrary in this point: For an Inn-holder doth not get his living by selling; For although he buy provision to be spent in his house, he doth not properly sell it, but utters it at such rates as he thinks reasonable gains; and the Guests do not take it at a certain price, but they may have it, or refuse it, if they will. And if an Ost takes excessive prices, he is indictable. And Innkeepers, many times, have Hay and Cozn & such things of their own growing; and their gain is not only by uttering of their commodoties but for the attendance of their servants, and for the furniture of their house, rooms, and lodgings, for their Guests: And an Inn-keeper is no more such a person who gets his living by buying and selling than Fermors, who buy for their provision: And the Statutes mention only those who are Merchants, and use to buy and sell in grosse, or by retail; and such who get their living by buying and selling, so as their principall

principal means is by buying and selling. Secondly, The question was, Whether a Copyhold be within the said Statutes to be sold by the Commissioners? For although it be expressly named in the Statute of 13. Eliz. in one clause, yet it is not in another; And in the Statutes of primo Jac. and 21 Jac. (upon which last Statutes this case is grounded) Copyholds be not mentioned, but generally all Lands, Tenements, and Hereditaments. But all the four Justices agreed, That Copyholds are within the intent and purview of all the said Statutes; For being in the first Statute, and the other Statutes made in further confirmation and approbation thereof, they ought to be expounded liberally, and shall be construed accordingly, to make as strong provision as they may against the Bankrupt. Thirdly, For as much as it is found, That this Land was given by the Father (two years before he was an Inholder, and six years before he became a Debtor) unto his son, and no fraud found (although there be circumstances of fraud, by the taking of the profits only, untill the time he became a Bankrupt) whether it be in the power of the Commissioners to sell it? And Berkeley held strongly, That it was in their power, because it is expressly within the words of 21 Jac. That they shall sell Lands which he purchased in the name of his Wife, Children, or Friends, named & intrusted by him; And this is so purchased, But all the other Justices were of the contrary opinion: For being purchased before he was a Tradesman, and so long before he became a Debtor, is not within the Statute; for the Statute intends such persons only who gained their livings by buying and selling, and by fraud had passed away their Lands to friends in trust, and became indebted, & committed such acts of a Bankrupt, That for such acts done by them after, it should be within the Commissioners power to sell such their Lands. But here, many years before, when he was a clear man, he procured this Land to be settled upon his Sonne. (No fraud or purpose of being a Bankrupt being found) It would therefore be a mischievous case, and full of inconveniences, if it should be within the Statute; For none might know with whom to deal by way of Marriage or otherwise when he is not a Tradesman, and settles Land upon his Wife and Children, Bona fide, and without cause of being suspected to be a Bankrupt, and afterwards becomes a Tradesman, & then a Bankrupt, if this act should overthrow a conveyance duly settled. And for that purpose was cited, Cok lib. 2. fol. 25. and Co. lib. 10. fol. 56. the Case of the Chancellor of Oxford, That fraud ought not to be conceived, unless it be expressly found; For Fraus est odiosa & non præsumenda. And in the tenth of King Charles, the Lady Gorges Case, Where the Earl of Lincoln purchased a Manor in that Ladies name, being his Daughter; And afterwards kept Courts, and made Leases in his own name, and alwayes took the profits, and then sold it to Sir Sydney Montague; And the Lady Gorge never questioned it in the life time of her Father. Yet it was held in this Court, unless there

there be some fraud discovered, it is not within the Stat. of 27 Eliz. although there be many badges of fraud: So here; Wherefore it was adjudged for the Defendant.

Dennis versus John Payne senior. Hill. 14. Car. rot. 680.

DEbt, upon an Obligation of 80 l. The Defendant pleaded ^{3.} That the Plaintiff in the Court of Poole (being a Court of Record) had brought debt upon the same Bond, against John Payn junior, wherein John Payn senior and John Payn junior were jointly and severally obliged with condition for the payment of 40 l. That After a Plea pleaded, the Plaintiff entered a Retraxit, and the Defendant averred, That it was the same obligation. And that the said John Payn junior, named in the Bond, and the said John Payn, against whom the Retraxit was, is one and the same person, and demands Judgement, if against this Retraxit, he ought to sue, &c. Upon this it was demurred, and Whitlock for the Defendant argued, That this Retraxit is in nature of a Release, and quasi a Release, as it is in Beechers Case, lib. 8. fol 58. And a Release to the one Obligor, is a discharge to the other; And if one Obligor be made Executor to the Obligee, it is a discharge for all the Obligors. So if a Feme Obligee takes one of the Obligors to husband, it is a discharge to them all. Rolls for the Plaintiff argued, That it is a barre only by way of estoppel betwixt that Obligor and the Obligee, whereof no other person shall take advantage; & it is not any release in facto, but only quasi a Release, and that this plea is no barre for the other obligor. And I inclined to that opinion, That it is neither a Release in facto nor in Law, but quasi an agreement, That he will no further prosecute: And it may be, the said John Payn junior payed the moiety of the said debt, and the Obligee agreed to accept it of him; and that he would no further proceed against him; and, being jointly and severally bound, he might make such an agreement, and not discharge the Bond. But Berkeley held, That the Plea was good, and was a good barre; For it is a Bond joint and severall; and one of them being discharged, it cannot now be a joint Bond; Wherefore the discharge quoad the one, is also a discharge quoad the other. But being no other Justices in the Court, it was adjourned.

Evelins Case.

Evelin being elected by the Parishoners of St. Thomas, to be ^{4.} Church-warden there with another, the Parson pretending, That by the Cannons he was to make election of the other, named one Hill to be Church-warden and procured Doctor Clarks Official to swear the said Hill, and to refuse Evelin; Whereupon the Parishoners surmising, That they had a Custom within the Parish, time whereof, &c. to elect both the Church wardens; And that

that the Cannons cannot take away their Custome, prayed a Writ to Doctor Clark to admit the Church-Warden elected by the, made to swear him, and move the Church-Warden elected by the Parson. And a president was shewn, in Jac, where such a Writ was granted, and it was said, There were divers other like presidents. And because the Church-Wardens in London are, for the greatest part, Corporations and owners of Land devised unto them, the Writ was granted. And the Court (being informed, That the said Hill, elected Church-Warden by the parson, sued the said Evelin, elected by the Parish, in the Ecclesiasticall Court) granted a Prohibition, to the intent it might be tryed whether there were any such Custome or no.

Wolnoughs Case.

5. **V**Wolnough and seven others were committed by the Mayor of London to Newgate, for refusing to enter into Recognisance, to appear before the Lords of the Councell: And upon an Habeas Corpora, returned by the Mayor and Sheriffs, it appeared, That by an Order from the Councell Table, They were appointed to come before the Mayor and Sheriffs, to treat concerning foreign matters: And when they appeared, being required by the Mayor being in Commission of Oyer and Terminer for the City, to perform the Order of the Lords of the Councell, and to enter into Recognisance in a reasonable summe, they refused, whereupon he committed them. And Peard, Maynard, and Kneeling junior, argued, That this return was not good, first, Because it doth not mention the Order, nor shew what the Order was; so as the Court might adjudge thereof. Secondly, Because the Recognisance is demanded of them to appear before the Lords of the Councell, no time nor place appointed, nor cause shewn why it was demanded: And because the Kings Councell prayed time to maintain the return, the parties were bayled untill next Term.

Aurundel *versus* Marc.

6. **A**ction for words. Whereas the Plaintiff was a Merchant, &c. That the Defendant said, He was a cheating Knave and had cheated his Father by returning 20 l. for Wares, &c. It was moved in arrest of Judgement by Rolls, That an Action lies not, for calling one cheating Knave. But for as much as he was a Merchant, and it touched his Profession, Berkeley and my self, (cæteris absentibus in the Star-chamber) held, That the Action was maintainable; Whereupon Rule was given, That the Plaintiff should have Judgement.

Bagnall versus Knight. Pasch. 15 Car. rot. 465.

ERror of a Judgement in the Common Bench, in an Action upon the Case, in nature of a Conspiracy, Where the Plaintiff declared that the Defendant falso & malitiose, caused such an Enditement of Perjury to be written containing hanc falsam materiam, &c. (reciting it verbatim) and exhibited it to the grand Jury before the Justices of Peace at Westminster, and procured it to be found. And that afterwards Sir Edw. Spencer, one of the Justices of the Peace of Midd. before whom, &c. delivered it with his own hands to the Justices of Goal-delivery, and of Oyer and Terminer at the Old Bayly, for the City of London, and the County of Midd. whereby he was brought to the Barre under the Sheriffs custody, and arraigned and acquitted. And hereupon Judgement being given in the Common Bench for the Plaintiff, The Defendant brings a Writ of Error. And Worlich and Farrer moved That the Declaration was not good; First, Because it is by way of recital of the Enditement only, & they relied upon the case of Brownig and Beeston, Plowd. 136. Sed non-allocatur; For it is Scribi fecit talem falsam materiam, which is a direct affirmative. The second exception, Because he doth not shew, that he was in the Goal, and then the Justices of the Goal-delivery have no power to meddle with him. Sed non allocatur; For ductus ad Barram & sub custodia, shews him to be in the Goal.

Dalby versus Dorthall and his wife. Mich. 14 Car. rot. 415.

ERror of a Judgement in an Action upon the Case, in nature of a Conspiracy; for causing them to be endicted of Felony falsely and maliciously, and to be detained in Prison Quo usque they were acquitted, ad damnum ipsorum, &c. Upon Not Guilty pleaded, and Verdict found for the Plaintiffs, Judgement being given for them, the Error assigned was, Because it was ad damnum ipsorum, whereas a Feme cannot joyn with her husband for damages, for it is a severall damage to either of them. And of that opinion was Berkley upon the first motion; For it is a severall wrong to either of them: and the Feme may not joyne for a tort done unto her husband. But I held the contrary, Because it is grounded upon one intire Record, by which they were both prejudiced, and they may joyn if they will: Or the husband only, may have the Action for it, that he was damnified; Whereupon it was adjourned, ceteris absentibus.

Child versus Greenhill. Trin. 14 Car. rot. 664.

TRespass for entering and breaking his Close and Fishing in 9.
Separali Piscaria sua, and for taking Pisces suas ibid. viz. 100
A a a Eleg,

Celes, &c. After Verdict, upon Not guilty pleaded, and found for the Plaintiff and damages intire given, exception was taken in arrest of Judgment by Maynard and St. John, That the Declaration was not good, to say *Pisces suas*; for he hath not any property in the Fish, until he takes them, and hath them in his possession. But Rolls and Grimston for the Plaintiff said, That being they were in separali *Piscaria sua*, it may well be said *Pisces suas*; for there is not any other may take them. And of that opinion was all the Court, who severally delivered their reasons; For, for Deer in a Park, or Cones in a Warren, the owner hath a special property in them, as long as they are in the Warren or Park; So of Doves in a Dovecote. But for Deer or Cones, if they be not in a Park or Warren, he may not say *suas*, unless he add, that they were domestic; Wherefore being taken out of his several *Piscary* (and not extra liberam *Piscariam suam*) the Action is maintainable: And it was adjudged for the Plaintiff. Vid. 43 Ed. 3 24 3 H. 6. 55. 22 H. 6. 59. the Register and Fitzherb.

Sprigg versus Rawlinson. Mich. 14 Car. rot. 153.

10. **E**RROR of a Judgement in the Common Bench, in an Ejectione firmæ of a Lease of a Messuage & unum Repositorium in Parochia Omnium Sanctorum. Habendum Tenementa, &c. from the feast of the Purification, for five years; and that the Defendant entered and ejected him from the Lands aforesaid. After Verdict upon Not guilty pleaded and found for the Plaintiff, and Judgement for him, Error was brought and assigned, That Repositorium is a personal thing called a Cupboard, which is removeable, and whereof an Ejectione firmæ lies not: Whereupon it was demurred, and very well argued by Phesant for the Defendant in the Writ of Error, and by Grimston for the Plaintiff. And Phesant urged, That Repositorium is not only a Cupboard, but also a Warehouse; and so is expressly mentioned to be in the Dictionary; And when Repositorium may be intended a Warehouse, and a real thing which may be demised, it shall be taken rather that way, than to construe it to be a Cupboard, which cannot be demised. And it was now argued by all the Justices: And Berkley and my self held, That the Declaration is good and not erroneous; for if it had been without Angliçè (a Warehouse,) it had been cleerly good, as all the Justices agreed, and now that it is put without an Angliçè being a good Latin word for a Warehouse, and so expressed in print, the Court may well take Conulance thereof, as of a real thing demisable; and when also 'tis mentioned with a Tenement, and an entry and ejectment made thereof, It must be intended to be a Warehouse, And when the Lease, upon which the Action was brought was shewn to the Curstors in Chancery, who made the Writ, it being a Warehouse in the Indenture, they translated it Repositorium, and well, because they had the Dictionary to warrant

Warrant it : And an Ejectione firmæ lies thereof, as well as of a Chamber, as 5 H. 7. 9. Or an Assise de Cellaria, as 24 Ed. 3. 33. Or of a Shop, as 48 Ed. 3. 4. & 14. Ass. 11. And although in Cok. lib. 11. fol. 55. Savells Case, it is held, That an Ejectione firmæ lies not of a Closse; yet it was said, That the contrary hath been since adjudged in Trin. 15 Jac. rot. 774. betwixt Wykes and Sparrow. And Berkeley said, That an Assise de Alneto, Bullaria, Salina and such like, although they be incertain in the Declaration, yet because they may be made certain, is good enough: So here it is certain enough what the Plaintiff shall recover, and of what the Sheriff shall put him in possession: Wherefore we concluded, That Judgement should be affirmed. But Jones and Brampton said, They conceived the Declaration to be ill, because Repositorium for a Warehouse is not used nor known in the Law; and they never heard or read of that word for a Warehouse: And in Calapine it is said to be a Woyder; and of such words which be not usuall, the Law shall not take any consuance, as they doe of Coragium, Curtelagium, Fodina, and the like which are words known at the Common Law. Wherefore they would advise. Afterwards in Pillary, 15 Caroli, because the Court were still divided in their opinions, The Defendant in the Writ of Error for his expedition, commenced a new Action, and consented, That this Judgement should be reversed.

Young *versus* Fowler. Hill. 14 Car. rot. 1264.

Action upon the Case, for disturbing him to execute his office ^{11.} of the Register of the Diocese of Rochester. Upon Not guilty pleaded, a special Verdict was found, That from time whereof memory, &c. The Bishop of Rochester, for the time being, hath used to grant the Office of the Register for all causes within the Diocese of Rochester, as well in possession, as in reversion, for life, Habendum & exercendum by such a person to whom such grant is made, when the Office comes into possession, per se vel sufficientem Deputatum, Habendum for the life of such a person, to whom such a Grant should be made. And they finde the Statute of primo Elizabethæ; and that Thomas Wardgar was Officer for his life 20. Jun. 1590. and was in possession for his life by a former Grant: And he being so in possession, John Young Bishop of Rochester eodem 20. Jun. 1590. by his Deed granted the said Office to John Young the Plaintiff, habendum & exercendum per se vel sufficientem Deputatum suum for his life, when it should be void by the death or surrender of the said Thomas Wardgar, which was confirmed by the Dean and Chapter, by their Deed 23. Jun. 1590. And they find, that the said John Young at the time of the Grant, was an Infant of the age of eleven yeers and six weeks and not above. But that he attained the full age of one and twenty yeers, in the lives of the Bishop & of the

said Tenant for life: And that the Bishop died in 5 Jac. and that Tho. Wargar died in 17 Jac. And that the Defendant disturbed him to exercise the said Office: Et si super totam materiam, the Court shall adjudge for the Plaintiff, They finde for the Plaintiff, and assess damages to 80 pounds and costs, &c. And if, &c. This Case was argued at the Barr by Maynard for the Plaintiff, and by Ward for the Defendant. The first question was, Whether this Grant of this said Office to an Infant of the age of eleven yeers, Exercendum per se vel Deputatum suum in Reversion, after the death of a Tenant for life of the same Office, be good, or not: Secondly, Whether an Office for life, usually granted in possession or Reversion, being granted by the Bishop in Reversion, & confirmed by the Dean and Chapter, be good to bind his Successors: And as to the first, all the Justices held, That this grant of the Office in Reversion, after the death of the Tenant for life, to an Infant of the age of eleven yeers, Exercendum per se vel Deputatum sufficientem (as the usuall Grants are) is good, notwithstanding the Infancy: And notwithstanding the opinion cited in Coks Littleton fol. 3. and there said to be resolved 40 & 41 Eliz. betwixt Scambler and Walter, that the Grant of the Office of an Understewardship in possession or Reversion to an Infant, is void, because he is incapable thereof not having knowledge to execute it pro commodo Regis & Populi. But this case was denied, unless it be with this difference, where it is granted without such a clause to exercise it, per se vel Deputatum. And where he is of such a tender age, that he cannot by intendment execute it by himself, as being an Infant of three or four yeers of age, who hath not discretion to execute it: But when there is a clause to execute it per se vel Deputatum suum sufficientem, it is good enough; for he may appoint a sufficient Deputy: And if he doth not elect such, it is a forfeiture of his Office, and a Deputy is allowed, especially in ministeriall Offices, and to be approved by the Judges of that Court. And as an Infant may present to a Church, because the Ordinary gives the allowance, whether the Clerk be sufficient; So the Lord of the Manor or the Judge of the Court is to give approbation of the Deputies sufficiency: and if the Deputy misdemean himself in his Office or be unskillfull, it is a forfeiture and at the Infants perill: And as an Infant may have an Office by descent as to be Sheriff, or Warden of the Fleet and the like, which are Offices of charge and of trust; So he may have an Office by Grant. Nor was the Plaintiff here meerly incapable of this Office, especially it being granted in Reversion, after the death of the Tenant for life, which fell not unto him untill he had attained his full age, and was sufficiently able to execute it. Also if it had fallen unto him at the time of the Grant, he was then of such age as by intendment he might have written the Acts and Orders, &c. or made election of a sufficient Deputy. Therefore they all concluded, That the Grant was good notwithstanding this exception, Vid. the cases 5 Ed. 4. 3. & 48.

Dy. 150. 39 H. 6. 32. 11 Ed. 4. 1. 1 Hen. 7. 28. 9 Ed. 4. 5. & 26. Where an Office may be entailed and granted in Fee, 21 Ed. 4. 13. An Infant may be a Pajoz; and the Acts by the Pajoz and Commonalty shal not be avoided by the Nonage of the Pajoz, Cok. Lit. 107. 18 Ed. 3. 3. Cok. lib. 128. 27. H. 6. Grants 12. Infant presents, Cok. Lit. 234. concerning Offices, 10 H. 6. 14. Contracts bind an Infant. The second point was, Whether the Grant of an Office for life in reversion, being usually so granted by the Bishop, with confirmation of the Dean and Chapter, be good against the Successor, or void by the Statute of primo Elizabethæ? For Ward objected, That it was void, Because it is not necessary, when there is an Officer in possession, to make another Officer: And when it is not necessary to be granted, it is void against the Successor by the said Statute, as it is held in the Case of the Bishop of Sarum, Coke lib. 10. fol. 60. 61. But the Justices resolved to the contrary: For being found to be an Office usually granted in possession for life, or in Reversion for life, Then every Bishop, for his time, may grant the Office, because it is a necessary Office, and ought alwayes to be full; so as when one dies there may be another Officer immediatly to execute the said Office, for the benefit of the Kings Subjects: And when it hath been usually granted for life in reversion, as here it is found it hath, there is not any prejudice to the Successor, for he takes not any matter of profit from him, and he hath an Officer who is necessary; And the Case cited of the Bishop of Sarum well warrants it: And in the Case secundo Caroli, in the Common Bench, betwixt the Bishop of Chichester and Freedland, it was held that the Grant of an ancient Office by the Bishop, without increasing of a new Fee (it being confirmed by the Dean and Chapter) was good against the Successor. But the doubt there was, Whether the addition of a new Fee made all the Grant, or only the additioned Fee, to be void? Wherefore they all resolved in this Case, That this Grant in Reversion, as it is confirmed is good; and adjudged it for the Plaintiff. Vid Cok. lib. 9. fol. 97. Sir George Reynolds Case, Cok. lib. 5. fol. 2. & 3.

Secles and others, Prisoners.

UPON an Habeas Corpora directed to the Keepers of the Porters Lodg (being the Prison for the Council of the Marches of Wales) it was returned, That they were committed unto him by virtue of a Decree of the said Councell, upon Information against them, That the one of them inveagled the sonne and heir of J. S. being of the age of seventeen years, in the night and when he was drunken, to marry the sister of another of the Defendants: Whereupon they were every of them liberally fined to the King, some of them to an hundred Marks, some to forty pounds, and an hundred

dred Marks damages to the father who was the prosecutor, and committed to prison for a year, and untill the said fines paid, and the said hundred Marks damages satisfied to the said J. S. and untill they entred a Recognisance for their Good-behaviour, and untill the said Court took further order: And it was returned also, That they were committed by vertue of an Order from the Lords of the Councell. And this return was held utterly insufficient for the last part, Because it was not mentioned what was the order of the Councell. It was also moved by Grimston, That the return was ill, to award to Prison, to remain there untill further order taken, which is utterly incertain. It was likewise doubted, whether the Court of Marshes might meddle with a clandestine Marriage to punish it, being a meer spirituall act: As also about the Sentence for damages to the party, although it be within the expresse words of the Instructions, &c. Whereupon day was given untill octabis Michaelis, and in the interim the parties were bayled.

Termino

Termino Michaelis, anno decimo quinto *Caroli*
Regis in Banco Regis.

Facy versus Lange. Trin. 7 Car. rot. 1549.

Attachment upon a Prohibition. The Plaintiff declares, 1.
That the Defendant sued him in Court Christian, after a
Prohibition delivered, for tythes which were discharged
per modum Decimandi. The first issue was, That he did not sue
after the Prohibition delivered. The second upon prescription,
and both found for the Plaintiff, and damages & costs given by the
Jury. And now Maynard moved, That neither damages nor costs
ought to be assessed, but the party is only finable to the King for the
contempt of prosecuting his Suit, &c. But upon a Judgement
in the Common Bench upon advisement and search of ancient
presidents; where the Suit being continued in the spiritual Court
after a Prohibition delivered, an Attachment issued upon the Pro-
hibition; and because thereby the party was damnified, and put to
his Suit of Attachment, which was found to be sued, the party
there recovered damages and costs. So the Court here unanimously
agreed, That the party shall have his damages and costs found by
the Jury, and Rule was given for Judgement to be entered
accordingly, unless cause, &c.

Barfoot versus Norton. Trin. 15 Car. rot. 1227.

Prohibition for suing for divers kinds of tythes, & inter alia for 2.
Honey, surmising it was not payable, quia volatilia; and it was
thereupon demurred: And now moved by Grimston, That by Law
tythes are to be paid for Honey, as appears in Fitzh. Nat. Brev. 51. g.
and Linwood fol. And of that opinion was all the Court; and
consultation was awarded, unless cause, &c.

North versus Wingate. Trin. 15 Car. rot. 973.

Error of a Judgement in the Common Bench in Debt upon the 3.
Statute of 1 & 2 Phil. & Mar. for taking ten pence for a dis-
treffs, where by the Statute, he ought to take but four pence, unless
in places where it is otherwise accustomed sub poena forisfacturae
5 li. The Defendant pleaded Non debet and the Jury found,
Quod debet the said 5 l. and assessed damages two pence, and costs

538. 4 d. And the Court increased the costs to 7 l. and Judgement given, that he should have Writ for the said 5l. and the said damages and costs; and that the Defendant be in misericordia: And of this Judgement Error was brought and assigned by Grimston, first, That no damages or costs ought to be given, because it is a penall Statute, and a penalty being given by the Statute, he ought not to have any costs and damages but the penalty only: And for proof thereof he cited Pilfords Case, Cok. lib. 10. fol. 115. That where a Statute gives single, or double, or treble damages, and doth not mention any costs, there the Plaintiff shall not recover any costs. The second Error assigned, Because the Judgement is Ideo in misericordia, where it ought to have been Ideo capiatur. But all the Court resolved, That the Judgement was good, & ought to be affirmed: For to the first, When a Statute gives a penaltis certain, and gives an Action of Debt, There, if the Defendant doth not pay it upon demand, but inforceth the party unto a Suit, and he recovers by Action of Debt, ex consequenti he shall recover his damages, because he did not pay the duty due by the Statute upon demand; & he shall also recover costs, For otherwise he should be at a losse to expend more than he recovers, which the Statute never intended. But where the duty is incertain as to recover treble damages, as upon the Statute of Waste, or upon the Statute of 2 Ed. 6. for not setting forth of Tythes, there the duty being incertain, the Statute intends to give the treble value only, and not any costs: And so are the presidents in Cokes book of Entries 163. & 164. And as to the second Error, The Judgement being in Debt for not payment, and not upon the Statute, the Judgement ought to be in misericordia.

Lee versus Russell. Trin. 15 Car. rot. 691.

4. **E**Rror of a Judgement in the Common Bench in Debt, upon an Oblation, conditioned, That if the Obligor accepted a Lease by Indenture of such Lands upon the Plaintiffs request, and sealed a Counterpart thereof that then the Obligation should be void. The Defendant pleads, That the Plaintiff did not request him to accept a Lease. The Plaintiff replies, That he caused an Indenture to be drawn of a Lease, according to the said condition, and to be ingrossed, and a label to be affixed thereto, cum sera appensa, and required & offered to deliver it to the Defendant to accept thereof, and he refused. And the Issue was upon the request and found for the Plaintiff, and Judgement given. And now error brought and assigned by Rolls, and by Godbolt Serjeant, ore tenus, first, That it was cum sera labello annexa; And sera is no Latine word for wax, but signifies a lock. Sed non allocatur; For it may be well intended for wax secundum subjectam materiam. Secondly, Because he doth not averr, That the Lands mentioned in the Indenture are the same Lands in the condition. But because he had pleaded Quod non requisivit: And he replied, That it was secundum

dum formam conditionis, therefore if they were other Lands, it ought to have been shewn on the part of the Defendant; otherwise they shall be intended to be the same Lands. The Judgement was affirmed.

Anonymus.

A Writ of Error was brought by the Bayle of a Judgement 5.
 Given against the Principall in the Court of the City of Westminster. The Writ was, Quod tam in redditione Judicii, quam in redditione Executionis, erratum fuit. And the Error assigned was, Because a Capias was awarded against the Bayle, and he taken in Execution without any Scire facias sued against him, which was a manifest Error. But an Exception was to the Writ of Error, Because the Bayle cannot have a Writ of Error of the principall Judgement: Which was agreed by the Court. But then the Question was, the Record being removed, Whether he may have a Writ of Error, Quod coram vobis residet: And thereof the Court doubted, and would advise.

Launder *versus* Brooks and others.

Ejectione firmæ of Lands in Kent, whereof Will. Brooks, being 6.
 seized in Fee, holden in Socage, (and of other Lands holden in Capite) by his Will in writing, devised the said Socage Lands to Brooks his base son, & the heirs of his body. The Defendant pretended there is a custom in Kent to devise Lands in Gavelkinde holden in Socage. And whether there were such a custome or no, was the sole Question: For if not, the Plaintiff hath good Title: And if such Lands were devisable by Custome before the Statute of 32 Hen. 8. then the Defendant hath good title. And the Defendant, to prove the Custome, shewed Fitz. N.B. fol. 198. that Lands in Gavelkinde are devisable by Custome; and M. Lambert fol. that Lands in Gavelkinde may be given or sold without the Lords licence: And Whitfeild Serjeant said, He interpreted the word given to be by Will, and the word sold to be by Deed, and produced, for Evidence, divers Wills out of the Registers Offices in Canterbury and Rochester, of Devises of Lands by Testament, in the times of the Kings, H. 6. Ed. 4 & H. 7. of severall Lands in severall Villages in Kent; And shews two Verdicts: The one in 9 Jac. where, in a Tryall at this Barre, the title was found for the Defendant, That it was a good Custome there; and the other Verdict 13 Car. at the Common Bench Barre, where Title was found for the now Defendant, That the Lands were devisable by Custome: And there

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was a Book of Reports shewn, where in Mich 41 & 42 Eliz. all the Court of the Common Bench agreed, That such a Custome was there, But they said, This custome ought to be pleaded, & that the Land so devised was holden in Socage; For although the Court shall take Cognisance of the custome of Savelkinde in Kent, without pleading, yet of this speciall Custome, to devise, &c. D^r. That the Lands are holden in Socage, D^r. That the *Feme* shall have the moiety for her Dowry, they ought not to take Cognisance without speciall pleading, they being particular customes: But for the custome of Savelkinde it sufficeth to shew, that it is in Kent, and of the nature of Savelkinde, without pleading the Custome; For the Court takes knowledge what the Custome of Savelkinde is. But Heath the Kings Serjeant, Porter Twisden and Denn did much endeavour to disprove the said Evidence, and to shew, There was no such custome to devise Savelkinde Lands holden in Socage; and for proof thereof relied upon the book of 4 Ed. 2. Mortdaunce for 39. That an Assise of Mortdaunce for lies not of Lands devisable. But all the Court resolved to the contrary, That an Assise of Mortdaunce for lies of Lands devisable, if it be true that his Ancestors died seized, unlesse it appears, that the Defendant claims by some other Title: But if the Defendant plead, That the Land is by custome devisable, and was devised unto him, It is a good barre of the Action. Secondly, It was objected. That many Wills were made of Savelkinde Lands, where generally the Lands were in use, and in the hands of Feoffes; and many presidents were of that kinde. But the Court answered thereto, That the presidents shewn were Deviles of Lands, without mentioning them to be in the hands of Feoffes; And they conceived they might devise by the custome: And a president was produced out of M^r. Lambert, of a Testament of Lands in Savelkinde before the Conquest, &c. But Heath answered, It was an ill president, Because the *Baron* & *Feme* devised; And it cannot stand with Law, That the *Feme* should joyn with the *Baron*. And Jones Justice said, That in North-Wales there is much Land, of this nature, by custome devisable by writing, or without writing. And they for the Plaintiff shewed, That in the Common Bench, after the triall was had in this Court, there was another Tryall in the Common Bench, 11 Car. by Knights, Esquires and Gentlemen, who found for the now Plaintiff, That there was not any such custome. But it was thereto answered in behalf of the Defendant, That the Lord Finch shewed his dislike of that Verdict. And afterward, 13 Car. upon full evidence, a Verdict was given for the Defendants Title, That there was such a Custome, and that Land was devisable by Custome there. And afterward, the Jury here going from the Barre to consider of this matter, sedente Curia, the Plaintiff was nonsuited.

Roe and Bond *versus* Devys. Trin. 15 Car. rot.

TRespasse. The parties being at Issue upon the Venire facias, one Samuells Sutton was returned, and in the Distringas he was likewise named Samuells Sutton. But upon the Panell annexed by the Sheriff, he was named Daniell Sutton of the same place, and returned and Sworn. This was assigned to stay Judgement, but the Sheriff being examined said, it was a mispision in his Clerk, who writ Daniell for Samuells: and the Clerk being examined, affirmed as much, and that Samuells Sutton was sworn and gave the Verdict: and the Jurores Samuells being examined, affirmed he was the same person who was sworn, and that his name was Samuells, and was of the same Vill, and that there was not any known by the name of Daniell Sutton within the said Vill; wherefore by order of Court it was appointed to be amended, and made Samuells in the Panell; For they held, That it was amendable as well by the Statute of 8 H. 6. as by the Common Law, it being an apparent mispision of the Clerk. But the Statute of 21 Jac. doth not extend thereto, but only to surnames mistaken, &c. which are to be amended, if by examination it may appear they be the same persons who were returned. And the Judgement was affirmed.

Reignolds Case.

ACrion of words. Whereas he was Deputy-Clerk to one Parker for divers yeers, who was Register under such an Arch-Deacon, and received divers Fees and Profits of that Office to render accompt. That the Defendant having communication of him and of his Office, and intending to deprive him of all his benefit thereof, & to cause him to incur the displeasure of his Master (the said Parker) and of the said Arch-Deacon, who reposed much trust in him, said of the Plaintiff, He is a base cozening Knave, he is a cheater and hath cozened his Master (the said Parker innuendo.) The Defendant pleaded Not guilty, and found against him, and damages 30 l. And now Charles Jones moved in arrest of Judgement, That these words be not actionable; for he doth not say, that he cozened him concerning his Office, and it may be intended, he cozened him in some other matter besides his Office, and then the Action lies not. But all the Court (absente Brampton) held, That the Action well lay; for it shall not be intended but that the words were spoken, concerning the execution of the Office, where the communication was concerning the Office; Wherefore it was adjudged for the Plaintiff.

Proctor versus Chamberlaine and two others.

9. **E**Rror brought of a Judgement in the Common Bench in Debt, against them as Executozs of one Chamberlaine. The one of the thzee Executozs appeared upon the summons, and confessed the Action, and Judgement given, *Quod recuperaret debitum against the thzee Executozs. And that he shall have Execution against the thzee Executozs de bonis Testatoris in their hands, si tantum, &c.* and the damages *de bonis propriis* of him who appeared, and misrecordia against all. And hereupon Scire facias issued into London, where the Action was laid, *Et si constare poterit per Inquisitionem, that they have wasted the goods, quod tunc Scire faciat to them to answer the Debt.* And upon a Devastavit found by the Inquisition and returned, a Scire facias taken forth, and two *nihilis* returned, Judgement and Execution issued against them, & Proctor was taken in Execution. And upon this Judgement, Writ of Error brought, and the Error assigned, Because the appearance was upon the summons and not upon the grand distress, and therefore out of the Statute of 9 Ed. 3. cap. 3. Secondly, Because it is misrecordia against the thzee, where two of them never appeared, and against him who appeared no misrecordia ought to be, because he came in upon the day of summons: And for these and other reasons it was resolved, That the party taken in Execution should be discharged.

Terreys Case.

10. **T**Errey, a Merchant, was endicted upon the Statute of 33 H. 8. of false Tokens, because that he by a false note in the name of John Du-boys obtained into his hands a Wedge of Silver of the value of 200 l. The Defendant being found guilty, exception was taken by Charles Jones and Holbourn, against the said Endictment for variance therein, in severall words, from the Statute. But because there was not any recitall, nor misrecitall of the Statute, but it was only an inducement to the setting down thereof, and not in any point materiall. The Court resolved it to be good enough: And thereupon it was adjudged, That he should stand upon the Pillory in Cheapside, and upon the Pillory in Cornhill neer to the Exchange, upon the Saturday following, and should pay fine to the King of 500 l. and be imprisoned during the Kings pleasure, and be bound with good Sureties for his good behaviour.

Termino

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in Banco Regis,

IN this Vacation Sir *George Vernon* Knight, of the County of *1. Chester*, first made Baron of the Exchequer, and afterwards one of the Justices of the Common Bench, A man of great reading in the Statutes and Common Law, and of extraordinary memory, died at *Serjeants-Inn* in *Chancery-Lane* 16. December 1639. And upon the 18. of December following was buried in the *Temple-Church London*. And *Robert Foster* Serjeant, being of the *Inner-Temple*, was sworn Justice in his place 3. January 1639.

Upon the 14. of January 1639. *Thomas* Lord *Coventry*, Lord Keeper of the Great Seal, died about four of the clock in the morning. He was a pious, prudent, and learned man, and strict in his practice, being Lord Keeper for fourteen years and upward: He died in great honor and much lamented by all people. And afterwards upon 18. Jan. 1639. Sir *John Finch* chief Justice of the Common Bench, and Chancellor to the Queen, was made Lord Keeper of the Great Seal, and sworn the same day at *White-Hall*, into the Office of Lord Keeper, and one of the Privy Councill: And the next day being Saturday sealed divers Writs at the house of Serjeant *Finch* in *Chancery-Lane*; And upon the Tuesday following sealed again; And upon Thursday the 23. of January he rode in great state to *Westminster*, the Lord Treasurer and the Earl of *Manchester* riding on each side of him, and accompanied by the Earl Marshall, the Admirall, the Earl of *Strafford* Lieutenant of *Ireland*, and by divers other Earls, Vicounts and Barons, and all the Justices of both Benches, and Barons of the Exchequer, and the Gentlemen of the four Inns of Court, and divers others attending upon him.

Upon the same day being the first day of the Term, Sir *Edward Littleton* Solicitor (who had his Writ to be Serjeant the same day, to the intent he should be made chief Justice of the Common Bench) appeared in *Chancery*, and was sworn Serjeant; and upon the Saturday following performed all the Ceremonies of a Serjeant, as well in his apparell as otherwise, and gave Rings, *quorum Inscriptio* fuit

And *Brampton* chief Justice made a short speech, declaring to him the duty of a Serjeant, but did not much insist thereon, because he was to be chief Justice of the Common Bench.

Dawson *versus* Lee. Mich. 15 Car. rot. 585.

2. **D**Ebt *sur* Contract. The defendant after Imparllance pleaded Outlawry in Barr. The Plaintiff saith *Null tiel Record*. And the Defendant had a day to bring in the Record and failed therein. The question was, What Judgement should be given? For Hoddeldon said, That in the time, when Tanfeild was their Judge, they held, That if the Defendant after Imparllance had pleaded Outlawry, and upon *Null tiel Record* pleaded, had failed of the Record, Judgement should be absolutely given, and not a *Respondes ouster*. And Berkeley and my self conceived it should be an absolute Judgement, for as much as he had pleaded in Barr and did not answer over. But Berkeley said, If the Plaintiff would pray only, that he should be awarded to answer over, he might so pray; for it is his delay only and no Error. But the Plaintiff, by his Atturmy prayed so have it absolutely, and so it was awarded, unlesse other cause should be shewn the Wednesday following: And after Dinner in Serjeants Inn, Brampton chief Justice and Jones (who were that day in the Star Chamber) being informed of this case, were of the same opinion: and so were Dampont chief Baron, and all the other Justices and Barons, to whom it was propounded.

Stevens Case.

3. **O**ne Stevens and Alice his daughter were indicted at the Sessions of the Peace in the County of Cambridge, before the Justices of Peace there; because the said Alice feloniously stole a Rake and Fork of the value of 3 s. and a Rope of the value of 18 d. and that Stevens the father knowing thereof, received and comforted the said Alice, and so was accessory. And hereupon they were arraigned, and pleaded Not guilty: and by means of one Spicer the under Sheriff, who returned two of his Servants to be of the Jury (as appeared by Affidavit of some of the Jurors) They were found guilty, and Alice the principall, because the goods were under value, and, according to the Statute, was awarded to be burned in the hand, and that she should forfeit all her Lands and Tenements, Goods and Chattells: And against the said Stevens Judgement was given, (because he had prayed his book and was returned *Legit ut Clericus*) That he should be burned in the hand, and so it was done immediatly to them both; and that he should forfeit all his Lands and Goods, and presently the under Sheriff seized the Lands, and also the Goods and Chattells of the said Stevens, being of the value of 500 l. and returned into the Erchequer, that he seized his Goods only, to the value of 3 s. (as it was informed at the Barr.) And upon this Judgement Stevens brought a Writ of Error: And Grimston being of Counsell with

with the Plaintiff assigned Error in the Judgement. And Berkeley and my self being only in Court, upon reading of the Record held it to be manifest Error; for the principall not being attainted but discharged by burning in the hand only according to the Statute, the accessary ought to have been discharged without any burning in the hand, and without being put to his Book; for where a man is principall, & another is accessary unto him after the fact, and both of them be convicted, if the principall prays his Clergy and hath it allowed, & be burnt in the hand, because he is returned Legit &c. the Accessary is to be discharged, without being put to his Book; for he ought not to be condemned, but where the principall is attainted, and not where he is convicted only, and had his Clergie, And so is the common experience and practice. Also the Judgement is erroneously given, Because it is that he shall forfeit his Lands and Tenements, after such conviction and Clergie allowed, Wherefore the Judgement was reversed: and the Clerk of the Crown was appointed to draw an Information upon this misdoemeanor, for the procuring of the said Stevens in such an undue manner to be convicted.

Crawleys Case.

Crawley being brought to the Barr upon an Habeas Corpus, 4.
directed to the Mayor of St. Albans, being in Gaole there, It was returned upon the Writ, That he was committed to the Gaole by the Justices of the Peace of the said Liberty, at the Sessions of the Peace holden 11. Julii 1639. till he should obey an Order of taking the Office of Constable upon him; for that he being an Inhabitant within the hundred of Casho, within the Liberty of St. Albans, had refused to execute the said place: And because it was informed on the part of the said Crawley, that he denied to be within the Liberty of St. Albans, but affirmed that he was within the County of Hertford, out of the said Liberty, All the Court held, That he was unjustly committed, because they ought not to have committed him, when he denied to be Constable, especially pretending that he was not within the Liberty: But should have caused him to be indicted upon this refusall, and if he were found to be within the Liberty, should have assessed a good fine, and then have committed him for that cause, Vide Cok. lib. 8, fol. 38. Greisleys Case. But as it is now returned, the imprisonment was not lawfull; Wherefore the said Crawley, by the opinion of the whole Court, was absolutely discharged without any Bayle.

U Pon Monday 27. January 1639. Sir Edward Littleton and Robert Foster appeared at the Common Bench Barr, and were 5.
placed in the midst of the Barr: And Sir John Finch Lord Keeper of the Great Seal, came into the Common Bench, and made a long and eloquent Speech to them both, signifying the Kings pleasure, to make
Sir

Sir *Edward Littleton* chief Justice of the Common Bench, for his good and long service, and his certain knowledge of his abilities to serve him : And the said *Robert Foster* to be *puisny* Judge there, for his good opinion which he conceived, and the good report he had heard of him: And afterwards both of them made severall speeches, giving thanks to the King, and signifying their willingnesse of endeavouring to perform their service to the King and his People, according to the utmost of their skill and abilities in their severall places.

Parker versus Edith Blecke. Hill. 13 Car. rot. 1002.

6. **T**Respasse. Upon Not guilty pleaded, a speciall Verdict was found, That the Land was Copyhold Land of Inheritance of the Manor of Cheltenham in Gloucestershire, whereof one *Arthur Blecke*, late husband of the Defendant, was seized in Fee, within which Manor is this custome (amongst others,) That if a Copyholder seized in Fee of a Copyhold Tenement dyeth, having a wife at the time of his death surviving him, that she shall have and hold the said Copyhold Land during her life, and for 12. yeers after, and found the Statute of 13 Eliz. of Bankrupt, and the Statute 1 Jac. And that, upon complaint of the Creditors, a Commission issued upon those Statutes directed to Warren and six other Commissioners, to inquire whether he were a Bankrupt: And if they found him to be a Bankrupt, That they, or three of them (whereof the said Warren should be one) should execute the Commission according to the Statutes. That hereupon the said Warren and three others, upon complaint of the creditors, examined the matters and adjudged him to be a Bankrupt; and found that he was seized in Fee of the said Copyhold, which was appraised to be sold to the value of 600 l. That they by Indenture 5 Aprill, 10 Caroli, introlled within the six moneths, reciting the causes wherefore they adjudged him to be a Bankrupt, bargained & sold the said Copyhold Land to *Arthur Parker* and *William Sothern*, and their Heirs, for 600 l. payed and secured to be paid, for the use of the Creditors of the said Bankrupt. And they finde a private Act of Parliament, made 1 Caroli, whereby the Customes of the said Manor are recited and established; And amongst others this Custome is mentioned and confirmed, That the wife of the Copyholder shall have Dower, and may have a Joynture assigned for her life: And that a Copyholder of Inheritance may make a Grant for his life and twelve yeers after: And it is therein provided, That all women now living, and late the wives of any the Copyholders of the said Manor, dying Tenants, and all the now wives of any the Copyholders of the said Manor, shall and may enjoy the Customary Lands of their now or late husbands, and be Tenants for their lives and twelve years after, as if this Act had never been made. And in the end of the said Act is a generall Clause: Be it enacted, That all Customes and Usages heretofore used and allowed within the said Manor, concerning the
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having or enjoying of any the said customary Lands or Tenements, by any widow of any customary Tenant of the same Manor, or by any after-taken husband of such widows, or the Heir or Heirs of such wife hereafter taking husband, or concerning the descending of any such Lands to any other person, or in any other manner or form than is before expressed, shall be utterly void and of none effect: And that all other lawfull Usages and Customes heretofore used within the said Manor, which are not repugnant and contrary to the true meaning of this Act, shall be and remain good and effectually, and are and shall be ratified by this Act: They further finde, That at a Court Baron of the Manor, 1. Aprill, 12 Car. it was found by the Verdict, That the said Edith survived her said husband, and ought to enjoy the said Tenements, in which, &c. for term of life of the said Edith, and for 12. yeers after: And that upon a presentment afterwards, viz. the aforesaid 1. Aprill, 12 Car. and before the admission of the said Alexander Parker and Will. Sothorn into the Lands, in forma prædicta facta, The aforesaid Edith was admitted Tenant of the Tenements aforesaid, in quibus, &c. secundum consuetudinem Manerii prædicti quodque virtute admissionis prædictæ prædicta Editha &c. tempore quo, entred, &c. And this was very well argued at the Barr by Glyn for the Plaintiff, and by Moreton for the Defendant, where two points were insisted upon: First, Whether by the bargain and sale made by the Commissioners, by virtue of the Statute of Bankrupts, the Estate of the Copyholder was vested in the Bargainee before admittance, although he might not enter before admittance, for then the said Arthur Bleek did not die Tenant, and so is not within the Custome that his wife should have widows Estate? Secondly, Admitting he died Tenant, and the widow had such an Estate vested in her, Whether the Heidees (by the bargain and sale to them before made) shall not afterwards defeat the Estate of the Feme by relation, and then the Plaintiff hath a good Title? And Berkeley and my self argued, That the bargain and sale binds the Copyholder and bars his Estate, and that he is no Copyholder after the bargain and sale enrolled: And the Bargainee by the Statute is only barred to take the profits, untill admittance which is for the Lords benefit in respect of the fine due to him thereupon. Secondly, We held, when the Bargainee is admitted by the Lord, It shall vest in the Bargainee, and shall have relation to the bargain and sale, and shall defeat the Estate which the Feme claimed by the Custome, as in the case of 7 Ed. 6. Brook. title Inrollments, Where one Joyntenant bargains and sells, and before the Inrollment the other dies, and afterwards the Deed is inrolled within the six moneths: yet the moiety only passed, and it is like the case where one bargains and sells by Indenture and takes wife and dies, and afterwards the Deed is inrolled within six moneths, the Feme shall not have her Dower, and so the case 22 Eliz. where Portgacee dies, his Wife being in Ward to the King, the con-

condition is afterward performed, the Wardship shall be divested. Jones and Brampton doubted of the point, untill they saw that the Record finds the Act to be particularly, That she ought to be the wife of a Tenant; And it is not intended, That after the sale of the Copyhold, he should dye Tenant; and he did not dye Tenant, because the bargain and sale took his Estate from him, and ousted him of the Copyhold. Wherefore they agreed, Judgement should be entred for the Plaintiff.

Bathells Case. Hill. 9 Car. rot. 958.

7. **E**rror of Judgement in the Grand Sessions, before the Justices in the County of Flint. Divers Errors were assigned and overruled in Michaelmas Term last; And now two Errors only insisted upon. First, That the Judgement was, Coram Justiciariis in Comitatu Flint; and he doth not say Magnæ Sessionis in Comitatu Flint. Sed non allocatur: For there be many of their Records as well the one way as the other, and good both wayes. Secondly, because the Venire facias was returned per Thomam Hamond Militem, nuper Vicecomitem of the said Countie; So it was not returned by the Sheriff, but by one who was late Sheriff; And it appears not that he was Sheriff at the time of the Panell made; For he ought to have subscribed his name, Thomas Hammond Vicecomes; which Error is not aided by any Statute. Sed non allocatur: For although the Writ be returned by J. S. the Sheriff, at the time of the Grand Sessions, when the said Action was tryed, as a Writ delivered unto him by the said Thomas Hammond his predecessor, in exitu ab Officio suo, with this return indorsed; yet it might be very well intended, That the Panell was made, and annured in the time when he was Sheriff: and this addition, Thomas Hammond nuper Vicecomes, is sufficient proof, when he is discharged of his Office: Whereupon the Judgement was affirmed.

Ireland *versus* lockwell. Trin. 15 Car. rot. 1181.

8. **E**rror upon a Judgement in Bathe, in an Action of the Case for words. Whereas the Plaintiff was a Taylor, and used and exercised the Trade of a Taylor in Bathe, and was a Freeman of the said Town, and had divers Customers in the County of Wilts, who used to imploy him in his Trade, That the Defendant at Bathe, within the Jurisdiction of that Court, said of him, That he cheated in his Trade, and other such words, much slandering him in his Trade, by which means he lost divers of his Customers in Bathe and in the County of Wilts; and they withdrew themselves from him, to his damage, &c. The Defendant pleaded Not guilty, and found against him, and damages assent to 100 Marks, and Judgement for the Plaintiff; and Error thereof brought and assigned, That the words were not actionable: But it was cleerly held, That they were actionable.

actionable. Then it was moved by Grimston, That the Jurors in Barthe (being within a private Jurisdiction) ought not to have assessed damages, for the losse of his Customers in the County of Wilts: And Berkeley much insisted upon it, That for this cause the Judgment was erroneous, as it was resolved in the Case, where an Assumpsit brought in Windsor Court, by one within the Jurisdiction thereof, That J. S. upon a valuable consideration, did promise to bring unto him so many loads of Billets from Heddeset, in the County of Bucks, unto Windsor. After Verdict, upon Non assumpsit pleaded, and found and adjudged for the Plaintiff, the Judgment was reversed, Because, it being a private Jurisdiction, they have no authority to inquire of any matter out of the same. And Jones, Brampton and my self agreed that Case to be Law: But we held, That this is only an Allegation, in respect of damages, for the increase of them, which they may inquire of in any place whatsoever: Wherefore the Judgment was affirmed.

Error of a Judgment in the Court of the Marshalsey in an Action upon the Case upon a promise, at the Parish of St. Clements Danes, within the Jurisdiction of that Court, in consideration of such a sum received, That he would pay him such a sum when he returned into England from Hamborough, (being a place beyond the Seas;) And alledges, That he such a day, went over Sea, unto Hamborough aforesaid; and returned such a day, to the Parish of St. Clements Danes, and that he demanded the money, and the Defendant had not paid. After Non assumpsit pleaded, Verdict and Judgment for the Plaintiff, Error was brought and assigned, First, Because he doth not alledge, That he gave notice unto the Defendant of his returne: And although it be alledged, That the Defendant habens notitiam inde, and upon such a day requested, had not paid; yet it was held cleerly, That the Declaration was insufficient for this cause; For he ought to have alledged express notice, and shewn the day and place of such notice given. Secondly, Because it is brought of an act to be done at Hamborough, out of the Jurisdiction of the Marshalls Court, being a private Jurisdiction; which was held also to be a manifest Error: For which causes the Judgment was reversed.

Scavage versus Hawkins.

Error of a Judgment in Debt, upon a Lease for years. The Error assigned was, Because the Plaintiff in debt counts, That his father was seized in tail, and made that Lease for years, rendering rent, and died seized of the Reversion, which descended unto him, as Son and Heir of his body; And doth not shew the beginning of the said Estate; which generally ought to be set forth, where he claims by a perticular Estate, (otherwise it is where he counts of a seisin in Fee;) But because this was in a Count, and not in Barre, nor

in an Abowry, and there were produced presidents out of the Common Bench, That such Counts are usually there: It was therefore held to be no Error; And the Judgement was affirmed, 21 H. 7. 26. 34 H. 6. 48. 2 Ed. 4. 11.

Bryan *versus* Wikes.

11. **E**RROR of a Judgement in Leicester in an Action upon the Case for words: The first Error assigned by Babington, because the stile of the Court, was, Placita coram J. S. Majore, & Joh. Chapman Recordatore, & J. D. & J. N. Aldermannis Burgi prædicti secundum consuetudinem Burgi prædicti, &c. And the plaint being entred, upon summons, a non est inventus was returned at a Court holden, coram dicto J. S. Majore & J. N. & J. D. Aldermannis secundum consuetudinem Burgi prædicti, &c. omitting the Recorder, which Babington alledged to be Error. & coram non Judice. Sed non allocatur; For it may be that at the first Court holden, the Recorder was there, and at the second Court, he was absent, and the Court is well held by the Custom there, before the Major and two Aldermen. The second Error assigned was, Because the Judgement there is in an Action for words, which the Defendant spake of the Plaintiff, viz. He hath stolen a Tree formerly cut down, which is Felony, and I will cause him to be endicted for Felony. Babington alledged, That the words were not actionable, because he doth not shew, when the Tree was cut down, Nor that there was some space of time between the cutting and taking away, for if it was not taken away instantly after the cutting it was not felony. Sed non allocatur; For the words are clearly actionable. For when he saith, That he stole a Tree, formerly cut down, it is intended to be a long distance of time, especially when he adds, And that it is Felony, and I will endict him of Felony; for it shews, He conceived he had committed felony, which was a great slander; Wherefore the Judgement was affirmed.

Owen *versus* Long and others. Mich. 15 Car. rot. 571.

12. **T**RESPASSE of Assault, Battery, and Imprisonment, apud Parochiam sancti Nicholai in Basingstreet for two dates, The Defendant justifies by reason of especiall Act of Parliament, for the releif of poor Debtors, 2 Jac. cap. 15. whereby it was enacted, That every poor Citizen and Freeman inhabiting in London, being sued for Debt under 40 s. may exhibite his suit in the Court of London, called there the Court of Requests in London, who shall nominate Commissioners to the number of 12. and that any three of that Commission may lend for any Creditor, who is complained of, in suing for such a Debt under 40 s. and if he refuse to come, or perform not their Orders, They may cause him to be arrested by any Serjeant of London, and commit him to Prison, there to remain, untill he perform the said Order. And the Defendant saith, That
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by reason of the command of such Commissioners, at such a Parish in Woodstreet, because he refused to come before them, he was committed to the Counter in Woodstreet, Et hoc paratus est verificare. Upon this, the Plaintiff demurred: And now Pheasant for the Plaintiff took divers exceptions to the Plea: First, Because he doth not shew, that the Debtor, who complained was poor and a Citizen and Freeman inhabiting in London, otherwise the Act doth not give them authority to meddle. Secondly, Because the Battery and Imprisonment is alledged in Parochia sancti *Nicholai*, and he justifies in another Parish, and doth not travers the Battery and Imprisonment alledged in the Declaration. Thirdly, The conclusion of the Plea is not well, Et hoc paratus est verificare, where there be two Defendants, for it ought to have been parati sunt, &c.

Martyn *versus* Nichols.

ERror of a Judgement in an Ejectione firmæ. The Error assigned, Because the Declaration was of a Messuage & 40 acres of Land, Meadow and Pasture thereto appertaining, and it was not distinguished how much there was in Land, how much in Meadow, and how much in Pasture; Therefore the Judgement was reversed. 13.

Canwey *versus* Aldwyn, Mich. 15 Car. rot. 132.

A Sumpsit. Whereas the Plaintiff at the Defendants request, amended such a Boat, and divers other Boats of the Defendants, That the Defendant promised to satisfy and pay him for his labor and charges about the amendment of the said Boats, tantum quantum meruit and alledges in fact, quod meruit 30l. and that he required the payment of the Defendant, who had not paid him according to his promise. The Defendant pleaded Non Assumpsit, which was found against him. And now moved by Crimston in arrest of Judgement, that the declaration was not good, because he alledged, That he amended and repaired divers Boats for the Defendant, and shewes not what, so by reason of that incertainty, the Defendant cannot know how much he should pay, and therefore compared it to Playters Case, Cok. lib. 5. fol. 34. Trespass quare Pisce suos cepit, and adjudged ill, for the incertainty. And of that opinion was Berkeley at the first, but upon better advisement, and reading over the Record, That he mended one and divers others, And upon a president cited by my self, That an Action had been maintained here by a Taylor, for making a Gown and divers other suits of apparell at the Defendants request, and that he promised to satisfy and pay tantum quantum, &c. And Hoddesden affirming there were divers presidents in the Court of this nature. Jones, Berkeley, and my self agreed, That the Declaration was good, and there was not any such incertainty, but that the Defendant (at whole

whose request the said Boats were amended) might well take Com-
nuſance, what Boats he deſired to have repaired: And the Verdict
finding quod Aſſumpſit, and aſſeſſing damages, Judgement was
given for the Plaintiff.

Anne Healings Widow *verſus* the Major, Commonalty, and
Citizens of London.

15. **E**rror of a Judgement in the Common Bench in Debt, brought
by them upon an Obligation of 400 l. The Error aſſigned was,
becauſe the Judgement is, That the Major, Commonalty & Citi-
zens of London, ſhould recover the Debt and ſix pounds for coſts,
eiſdem Majori & Communitati adjudged (omitting Civibus) and ſo
no ſuch Corporation: which was held to be Error. But afterwards
upon a motion in the Common Bench, and upon examination
and peruſall of the Dogget-Roll (where it was well entred) it
was awarded to be amended.

The King *verſus* Sir John Dryden, Gybbs, and others :

16. **R**ight of Advowſon againſt them as Coparceners. Upon a ſpe-
ciall Verdict by the grand Aſſiſe, It was ſhewn that the Te-
nants were Coparceners, & that Margaret Gybbs one of the Te-
nants was dead *puis darraigne continuance* before this Term, which
was pleaded in abatement of the Writ. Hereupon the Kings At-
turney traaverſeth, that they were Parceners: And upon that it was
demurred: And being moved in Court, it was adjudged without ar-
gument, That the Writ ſhould abate, & appointed that Judgement
ſhould be ſo entred: For all the Court agreed, although it were ad-
mitted, they were not Coparceners, but Joynt tenants, yet the death
of one of them ſhall abate the Writ being in a reall Action: and it
is not like to the caſe of an Aſſiſe of novell diſſeiſin, or of an Aſſiſe of
Forfeiture, where death of one of the Tenants ſhall not abate
the Writ, as long as there is a Tenant living; for it is here allowed
that every of them is Tenant of a Freehold: And although the At-
turney Generall affirmed there were two exprels Books in the
point, viz. 13 Ed. 3. tit. Breve, 260. & 27 Ed. 3. 83. Yet upon view of
the ſaid Books, they conceived, they do not extend to this caſe; for
it was only in a Scire facias upon a *Petition de droit*, which differs
from this Caſe, Vid. 7 H. 4. 33. temp. Ed. 1. Breve 857, 858. 40.
Aff. 15. 1. Aff. 12. 1 Ed. 3. 12. 6 Ed. 3. 270. 7 Ed. 3. 300. 43 Ed. 3.
16. 12 H. 6. 2. But it was afterward adjourned by Maſter At-
turneys impoſtunity untill Eaſter Term, pretending that he would
then argue the caſe. Poſtea pag. 583.

Smith *verſus* James.

17. **E**rror of a Judgement in the Court of the Pallace of Weſtm. by
the Principall and Bayle: The Error aſſigned was as well
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in the principall Judgement, as in the Execution against the Bayle. And it was moved by Grimston, That therefore the Writ of Error was not well brought: And all the Court were of the same opinion; Whereupon the Writ of Error was abated, then they brought severall Writs of Error quæ coram vobis Resident. And the Error assigned by the Principall was, That the Declaration was ill, and upon reading of the Record, it appeared in his Declaration, that upon 23. December, 13 Car. in consideration of such a summe of money. The Defendant assumed and promised, That he 23. January, 13 Car. would pay such a summe of money to the Plaintiff. And because it appears by his own shewing, That this Action was brought before there was any cause of Action, the Court held, That the Declaration was ill, and the Judgement (although it was after Verdict for the Plaintiff) was erroneous, and therefore reversed: and then the Writ of Error by the Bayle is not examinable, but falls of it self.

Sands versus Trefuses.

Action upon the Case, for stopping a Water-course running 18. to his Mill, And declares, That he was seized in Fee of a Mill, and had a Water-course running in the Defendants Land, to the said Mill, and that the Defendant had stopped his Water-course, The Defendant pleads a vitious Plea; Whereupon the Plaintiff demurred: And now Beare for the Defendant moved in arrest of Judgement, That the Declaration was ill, because he doth not declare that his Mill was an ancient Mill, and that the Water-course, was an ancient Water-course, nor doth he prescribe to have a Water-course in the Defendants Land. But all the Court held it to be well enough, and may well maintain his Action upon the Case, being lawfully in possession, and the stopping of the Water is tortious, and a damage to his Mill, and although he doth not shew que Estate, that is not materiall: and it hath been divers times so ruled, viz. 33 Eliz. betwixt Sly and Mordant. But because this was moved the last day of the Term, day was further given untill the next Term.

Earl of Oxford versus Waterhouse.

Error. After a speciall Verdict and argued at the Barr, there 19. was a Discontinuance entred by the Plaintiff, as it was agreed he might: It was moved, That costs might be assessed for the Defendant. But the Court doubted whether costs might be assessed, Because there was no Verdict given in the case.

The Major and Commonalty of London versus Alford.

Trespasse. Upon a speciall Verdict, upon Not guilty pleaded, 20. and tried at the Barr, the case was, One Sir George Monox,

nox formerly Mayor of London, being seized in Fee of 20. Messuages in London, holden in Burgage, where the Custome is, that they be deviseable, as well in Mortmain, as otherwise, erected an Alms-house and a School house in Walthamstow, in the County of Essex; and for the maintenance of the said Alms-house, School-house, and a Chappell there, he devised by his Will in writing, 33 H. 8. those Tenements, whereof one of them is now in question, to Giles Briggs, Roger Alford, and four others, whom he made his Executors, Habendum to them, their Heirs, and Assignes: Reciting, That whereas he had erected an Alms-house in Walthamstow, for 13. poor People, and a School-house and Chappell there, he devised those Tenements to the said six persons and to their Heirs and Assignes, upon condition, and to the intent and effect, That his said Executors and Feoffees, their Heirs and assignes, should pay out of the issues and profits of the said houses 4 l. 7 s. 4 d. in manner and form following, viz. to an honest Priest which shall be Schoolmaster, and teach children, 6 l. 13 s. 4 d. yearly; and also pay weekly to the poor Alms-people there 7 d. a peece, and 5 s. yearly to be bestowed upon an Obitt; and to pay to an able Clerk, to help to teach the children there, 26 s. 8 d. and other charitable uses: And if any part of the said purposes remained undone and unperformed, Then they finde, That he devised the same to William Monox and to the Heirs males of his body, upon condition, and to the intent to perform all the said trusts and purposes: And if he failed for two moneths, then he devised them to the Mayor and Comminalty of London, upon the same conditions, & to repair London-Bridge: And if they failed, That his Heir should enter and perform the same, & by a Schedule annexed to his Will, he appoints and adds, some other conditions to the said Estate, and appoints, That none of those Devisees should hold by survivor, but that the Heir of him who died, should have his part. And further it was found, That in 35 H. 8. the said Sir George Monox died seized in Fee, and that the said six Devisees entred and enjoyed the Tenements, but that none of them paid the summs appointed to the Clerk who was to attend in the Chappell, but had failed in that point: They further found, That the said Roger Alford died Ed. 6. and that Edward Alford was his Heir and entred into his part, but hath not performed the trust in this point, That in 5 Eliz. the Heir of Sir George Monox entred, for breach of the condition, and that Edward Alford entred and *custed* him, and that afterward the said Edward Alford purchased the parts of the other Devisees, by Deeds indented and enrolled in the Hustings, who in 11 Eliz. bargained and sold all their Estates and Rights in the said Tenements, to the said Alford and his Heirs, upon trust that he should perform the purposes and Declarations in the Will of the said Sir George Monox appointed, and that the said Alford was in possession, and that afterward, viz. 35 Eliz. he being in possession, A fine *sur* Release with Proclamation was levied unto him, and that he continued his possession, and died seized, which

which Land descended to the Defendant his Sonne. They finde further, That the said summe of 26 s 8 d. was never paid unto the said Clerk to this day, and that neither the said Heir of Sir George Monox, nor the Major of London & Commonalty had any notice of this Will, nor of the conditions, nor of the non-payments, until within these four years last past: And that after notice, the Major and Commonalty entred, and Alford re-entred, whereupon the Action was brought: Et si super totam, &c. Judgement shall be given for the Plaintiff, was the question? And it was very well argued at the Bar for the Plaintiff, and by Serjeant Finch for the Defendant. Upon the argument three main questions were made: First, Whether this be a condition or limitation appointed by the Will? And admitting it be a limitation, and that it may, after the first limitation, be good to the Heir of Sir Gorge Monox, Whether such limitation may be good to the Major and Commonalty, being but a possibility? Secondly, Admitting that they be limitations and good limitations of the Estate of the Devises, this being broken in the first year, and so de anno in annum, Whether there be a good title of entry for the Heir of Sir George Monox, and after to the Major and Commonalty, for not performing of the trusts; and they not having entred, but suffering a fine with Proclamations, and five years to pass, Whether this be not a barr to their entry? Thirdly, Admitting there hath not been performance of the Will, but a breach of the trusts, Whether the want of notice shall aid them? Because the words of the Will are, If through oblivion or other cause, the trusts be not performed, then they shall re-enter. And the Court resolved, That the fine with Proclamations, and the five years passed, hath absolutely barred the Plaintiffs Estate: And they conceived also, That it is a void limitation to the Major and Commonalty, being a possibility upon a possibility, Vid. Coke lib. 1. Reſtor de Cheddingtons Case. And that the finding they had not notice, was not material, for there is not any appointed to give notice, & they at their p. till ought to take notice of breach of the Estate. But for these two last points, they were not so unanimously resolved: But for the second, they all absolutely held, That the fine with the Proclamation, and the non-claim and five years passed, hath absolutely barred them; Whereupon Judgement was given against the Plaintiffs.

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Termino Paschæ, anno decimo sexto *Caroli*
Regis in Banco Regis.

Freemans Case.



The Freeman was brought to the Barr by Habeas i. Corpus out of the Fleet, and the return was, That he was committed 14 Feb. 1639. by the Lords of the Privie Council, for divers causes and misdemeanors, until they gave order to the contrary, as appeared by their Warrant there produced. It was also returned, that he was to be detained by another Warrant from the said Lords, 26. April 1640. wherein is mentioned, that he, being warned by a Messenger in December to appear before the said Lords, refused to come before them, and in contempt made a *rescous* and caused thereby a great tumult in the Town, which being proved before the said Lords, by the oath of two persons therein named, they thereupon, the 14 Feb. 1639. committed him. And now by this Warrant appointed the Warden of the Fleet to retain him, until they gave further order, &c. Whereupon Bagshaw for the prisoner moved, That he might be discharged, or at least bailed. And as to the first return, the Court held, If there had not been a second commitment returned, he ought to have been bailed: But for the second, they gave time until Saturday, for the Kings Counsel to maintain the return, and to shew cause, why he should not be bailed: And the Kings Counsel said, They would proceed against him by Indictment or Information; and that there were divers presidents, where such Informations have been brought in this Court for misdemeanors.

Anonymus.

The J. S. upon an Habeas Corpus was brought to the Barr, 2. And returned, that he was committed by order of the Ecclesiastical Court, 9 Car. for not paying of a fine of 50 l. by the Ecclesiastical Commissioners imposed upon him: And although it were not shewn wherefore the said fine was imposed; yet because that commitment was by a Judicial Court, this Court would neither baily nor discharge him.

D d d a

Norton

Norton *versus* Acklane, Hill. 15 Car. rot. 549.

3. **C**Ovenant upon an Indenture of Demise by the Plaintiff to the Defendant of an house for years: Wherein the Lessee Covenants for him and his Assigns, to repaire the house from time to time, and to leabe it at the end of the term sufficiently repaired: and for not repairing, assigns the breach. The Defendant pleaded, That he assigned (by Indenture shewn in Court) all his Estate and interest in the Term to Joh. St. such a day and year; who entred and paid his rent at such a feast after, to the Plaintiff the Lessor, who accepted thereof; & that there was not any default of reparations, before the assignment. Upon this Plea the Plaintiff demurs: And Broome for the Plaintiff shewed, That the Action well lies against the Lessee, notwithstanding this acceptance of the Assignee to be his Tenant, or against the Assignee at his election, and he said that it was adjudged so in this Court, Hillar. 16 Jac. betwixt Brett and Cumberland (the Record whereof is entred Hill. 14. Jac. rot. 1486. And Brampton and my self were of the same opinion (Jones and Berkeley being then absent,) And because we conceived the case to be clear and so adjudged in the case last cited, we gave Rule, That Judgement should be given for the Plaintiff, unless, &c. And Jones and Berkeley being informed thereof at Serjeants-Inn, agreed, That the Action well lay.

Anonymus, Hill. 15 Car. rot. 1656.

4. **A** Writ of Distringas, Villatas circumadjacentes Villæ de Dorling, Ad levandum Sepes & Fossatas, &c. prostratas per diversas personas ignotas, & ad inquirendum, &c. Which Inquisition being returned and the Malefactor unknown, they found damages by vertue of the Statute of Westm. 2. cap. 46. And hereupon the Kings Atturney prayed a Distringas against the Inhabitants, And whether he should have it without a Scire facias sued to answer, and what Process he should have was much doubted: Wherefore the Court would advise thereof.

Reymond *versus* Burbedg. Trin. 15 Car rot. 1656.

5. **E**Rror upon a Judgement in the Common Bench in Debt upon an Obligation condition for performance of an award. Upon demurrer (because it was conceived the arbitrimient was void) Judgement was given for the Defendant, Quod querens nihil capiat per Breve. And now Godbold for the Plaintiff assigned, That it was Error; for the Action was there brought by an Atturney, by a Bill of privilege, and not by original Writ; so the Judgement ought to have been nihil capiat per Billam, and not nihil capiat per

per Breve; & it was held a manifest Error, unless it were the mistake of the Clerk and amendable, But the Court doubted thereof, Because it was in the Judgement, which is by the Court, and is not to be accounted the entry of the Clerk only, vide 14 Eliz. Dy. 315. Error of a Judgement in Trespass against a Bishop, for omitting, Ideo capiatur pro fine and resolved to lie well enough without it, for a Capias lieth not against him. But for this point the Court would advise,

John Bishop of Salisbury *versus* Hunt and others. Trin. 15 Car. rot. 543.

TRespass, For carrying away two loads of Wheat being set out for Tythe, severed from the nine parts at Stapleham in the Parish of Damorham. The Defendant pleads, That Queen Eliz. was seized in Fee of the Rectory appropriate of Damorham, and being so seized by her Patents dated 20 Junii anno 22. Regni sui, granted and demised the Tythe of Corn and Hay growing in Damorham and Stapleham, to Anthony Ashley for his life, remainder to Robert Ashley for his life, that Anthony Ashley was seized for life and dyed, and afterwards Robert Ashley surviving was seized: And that the Defendants by his command, and as his servants, took the said loads of Wheat, &c. The Plaintiff replies, That before the Grant to Anthony Ashley and Robert Ashley, Queen Eliz. in the 15th. year of her reign, by her Letters Patents, granted the said Tythes to Thomas Stockman for 21 years; & that in the 17. year of her reign by her Letters Patents, reciting the said Lease, she granted the Reversion of the said Tythes to the Bishop of Salisbury & his Successors, and entitles himself as successor, and that the Tythes were severed, &c. and the Defendants had taken them, &c. Upon this replication the Defendants demurred generally, & Maynard for the Defendants shewed the cause to be; for that the Defendants intitle themselves by Grant from Q. Eliz. anno 22. Regni sui, & the Plaintiff claiming by Q. Eliz. doth neither confess and avoid nor traverse, &c. And being argued at the Barr, Berkeley and my self held, That the Plaintiff needs not to confesse and avoid, nor traverse, when he claims by a former Grant from the said Queen, viz. anno 17 Regni sui, which precedes the title alledged by the Defendants: And if it be not a good Grant, the Defendants, who claim by a latter Grant, ought to have traversed the precedent grant to the Plaintiff, which is presumed to be good until the contrary be shewn; & the Plaintiff needs not to answer to a puisny Grant, alledged to be after his Grant; & cited the case Cok. lib. 6. fol. 24 Heliers Case, & 2 Ed. 6. Br. Confess. & Avoid. 66. Dyer. 366. 10 Ed. 4. 6. But Brampton & Jones doubted, Because the Queen might peradventure have a latter title & make a good Grant, this being argued in Pillary Term, was adjourned until this term: and now Brampton said, That he had considered of the books cited, & agreed that the Plaintiff claiming by a former Grant, needs not to make either a confession

confession and aboydance, nor traverse; Whereupon Rule was given (Jones absente) That Judgement should be entred for the Plaintiff, unless, &c.

Plowden *versus* Oldford. Mich. 15 Car. rot. 86.

7. **E**rror of a Judgement in the Common Bench. The case upon the Record was, That Parson, Patron, and Ordinary, before the 13 Eliz. made a Lease for 99. years, there being a Grant of the next aboydance before this Lease: Afterwards the Parson, who made this Lease, died; the Grantee of the next aboydance presents another, who being admitted, instituted, and inducted, entred and aboyded this Lease during his time, and afterward died; the Patron, who joyned in this Lease for years, presents a new Incumbent, who was admitted, instituted, and inducted: And whether he shall hold it discharged of this Lease for years, as his predecessors did, was the question? And adjudged that he should; for the Lease is totally aboyded by the entrance of the second Incumbent, & not for his time only. And of this opinion were Jones and Berkeley (for Brampton and my self were in Chancery) and their reason was, Because the Parson hath the intire Fee, as a Parson may have of a Rectory-presentation: And when he is in, and hath evicted the Lessee, it is an absolute eviction of the intire Term, without expectation of reviver, and it is not only an eviction for himself, but for all his Successors, Wherefore they gave rule, That Judgement should be affirmed. And this being reported to Sir Joh. Brampton chief Justice of this Bench, to Sir Edw. Littleton chief Justice of the Common Bench, to Dampont chief Baron, and to my self, We all agreed to that Judgement: And afterward the case being moved again by Godbold Serjeant, to have day till next Term; to speak in arrest of Judgement, The Court would not give any further day, but the Judgement was affirmed.

Torles Case.

8. **T**Orle, and four others of the Parish of St. Bartholmew, were brought to the Bar by Habeas Corpora, and by the return it appears, That they were committed to a Messenger, for contempt to the Ecclesiastical Commissioners, for not performing of their order, in paying the Parish Clerk his wages, rated by their order at 4d. the quarter for every house in Great St. Bartholmews, which they refused to pay but according to their custome as they were rated by their Church-wardens and Vestry. And now Doctor Merrick and Doctor Eccleston moved, That they should be remanded; for they said, This order was grounded upon the Kings Letters Patents wherein it is provided, that the Clerks should gather and receive their wages as should be ordered by the high Commissioners, and pretended that for any contempt, they might

might fine and imprison. But upon this return they were bayled until the first Tuesday next Term.

John Parkers Case.

John Parker was brought to the barr by Habeas Corpus, and the 9. Cause of his Commitment appeared to be, by vertue of a Writ, de Excommunicato capiendo, grounded upon the Chancelloz of Norwich his certificate into the Chancery, It was pleaded that this Excommunicato capiendo was void, and that the party was not lawfully imprisoned, because by the Statute of 5 Eliz. the Writ ought to have been brought into the Kings Bench, and to have been enrolled there and delivered in convenient time to the Sheriff. And all the Court resolved he was not duly imprisoned; and therefore he was discharged.

The Case of Sir John Dryden ad sectam Domini Regis cujus principium ante pag. 574.

WAs now in the end of this Term moved again, That the 10. Writ of Right of Advowson should abate by the death of one of the Tenants; although it be admitted that they were Joynt-tenants. Now because neither Master Attorney, or any other, had argued for the King all this Term, all the Court retained their former opinion, That the Writ should abate, and that Judgement should be entred accordingly, Vid. postea 585.

Thomas Bensted's Case.

Thomas Bensted, die Jovis post clausum Terminum, was indicted 11. and arraigned before special Commissioners of Oyer & Terminer in Southwark, wherein all the Justices and Barons were in Commission and present; at which time, upon conference with all the Justices, it was resolved, first, That going to Lambeth House in warlike manner to surprize the Archbishop, who was a Privie Councelloz, (it being with Drums and a multitude (as the Indictment was) to the number of 300 persons) was Treason. Secondly, That the sitting and inquiry and triall of the Prisoners, all upon one day, by vertue of the Commission of Oyer and Terminer, without any Commission of Saol-delivery, was good enough, notwithstanding the Book of 2 H. 8. which was held to be no Law. Thirdly, It was resolved by ten of the said Justices seriatim, That the breaking of a Prison wherein Traytors be in durance, and causing them to escape, was Treason; although the parties did not know that there were any Traytors there, upon the Statute of 1 H. 6. 5. And so to break a Prison whereby Felons escape, is Felony, without knowing them to be imprisoned for such offence.

Termino



Termo Trinitatis, anno decimo sexto Caroli Regis,
in Banco Regis.

1. **M**emorandum, That in the vacation betwixt Easter and Trinity Term, by the nomination of Sir *John Finch* Knight, Lord Keeper of the Great Seal, and Sir *Edward Littleton* chief Justice of the Common Bench, these twelve were appointed to be Serjeants, viz. *John Stone*, *John Whitwick*, and *Henry Rolls* of the *Inner Temple*, *William Littleton* (second brother of the said Sir *Edward Littleton*) *Bryerwood*, and *Robert Hide* of the *Middle-Temple*, *Richard Taylor*, *Edward Atkins*, and *John Green* of *Lincolns-Inn*, *Peter Pheasant*, *Francis Bacon*, and *Sampson Evers* (the Kings Attorny in the Marches of *Wales*, and now made one of the Kings Serjeants) of *Greys-Inn*, all of them then Benchers, and having been Readers of their respective Houses, who had Writs delivered them, bearing *Teste 21. Maii*, returnable in Chancery *Octabis Trinitatis*, which was *die Lune*: and they appeared in Chancery *die Jovis*, being *die quarto die post*, and were sworn, and gave Rings, &c.

Leytons Case.

2. **R**ichard Leyton was endicted, for that he at S. in the County of Midd. had erected a Barn upon parcell of the High-way leading from and concluding *Ad grave & commune nocumentum omnium Leigeorum ac subditorum Domini Regis per viam prædictam euntium transeuntium equitantium, &c.* And Grimston moved, (the words contra pacem being omitted) That the Endictment might be quashed; for which cause Berkley and my self being only in Court, agreed that the Endictment was ill: And I held That it ought by the Law to be quashed. But Berkeley would not agree thereto, because the usual course is not to quash an Endictment for Nuisance in an High-way, without a certificate that the Nuisance was removed and avoided: And although there were a certificate by many of the Inhabitants, within the said Vill and places adjoyning, That the Barn was not erected upon the High-way, nor the High-way straightned thereby: Yet Berkeley would not assent to have the Endictment quashed. But I conceived, Because the certificate was that there never was any such Nuisance erected: and the Endictment being agreed to be vitious, it ought to be quashed for the said Error, when it is apparant, &c. For to traverse and try it is a charge and to no purpose, because the party in an Action upon the Case, cannot recover his damages and costs, for falsly and maliciously endicting him, although he be acquitted; especially here when the Endictment is tetally vitious.

Joha

Abdy Alderman of Londons Case.

John Abdy Alderman of London having an house at in 3: the County of Essex, where it was pretended, that Constables should be elected out of the Inhabitants in every house, by presentment every year in the Leet of Sir William Hicks, Lord of the said Manor and Leet; the said Alderman Abdy by the name of John Abdy Esquire, was nominated in a Leet holden such a day, to be Constable there, for the year following. And because he refused, one John Duke being Steward there, imposed a fine upon him, and denied him his privilege to be freed by reason of his being an Alderman; Whereupon this being suggested, it was moved, To have a Writ out of this Court, directed to the Lord of the said Manor, or his Steward to discharge him, because he being an Alderman of London, ought to be there resident the greatest part of the year, and if absent, is fineable. And all the Court held, That he ought to be discharged by his privilege; as Attornys attending in Courts are discharged of such Offices of Constables and other Offices in the Parish. And although it was said, He might execute it by Deputy, and his personall attendance is not requisite by the custome of the said Manor. Pet non allocatur; Whereupon it was awarded. That a Writ should be directed to the hand of the said Manor to discharge him.

Sir John Dryden, Margaret Gybbs, and Will. Kingsmill Plaintiffs,
versus Thom. Yates, and the Bishop of Peterborow.
 Mich. 10 Car. rot. 1433. Ante pag. 583.

Quare impedit, ad presentandum ad Ecclesiam de Middleton-
 Cheney: Wherein the said Plaintiffs count, That William
 Wilks was seized in Fee of the Advowson of the said Church as in
 gross, and the Church being void, presented thereunto one Edward
 Broome, who was admitted & instituted in the time of Q. Eliz. and
 being so seized died, which descended to Robert Wilks his Sonne &
 Heir: And he being so seized, died seized without issue, which descend-
 ed to Anne, Frances, and Margaret, as to his Sisters and coheirs
 whereby they were seized in Fee. That Frances took to husband
 Sir Erasmus Dryden Baronet, who died seized of that part of the
 Advowson pro indiviso with the other two Sisters, which de-
 scended to Sir John Dryden their Sonne (and so conveys the de-
 scents to the other Sisters) and that by the death of the said Ed-
 ward Broome, the last Incumbent, it belongs unto them to present:
 And the Defendants disturbed them. The Bishop pleaded, that he
 claims nothing but as Ordinary. The Defendant Yates pleaded
 That he is Parson Imparsoned of the presentment of the King:
 And that before the said William Wilks had any thing to doe in the
 said Advowson, Queen Eliz. was seized in Fee of the said Advow-
 son jure Coronæ, as of an Advowson in grosse: And after the death

of the said Incumbent, presented James Ellis, who was admitted, instituted, and inducted: That afterwards Queen Eliz. died, and the said Advowson descended to King James, and from him to the King which now is, who presented the Defendant. The Plaintiff replies, as in his Declaration, That the Church being void by the death of Broom, they presented, &c. and traverse, that James Ellis was admitted, instituted, and inducted, upon the presentation of Queen Eliz. And so joyned issue, and found by Verdict at the Common Bench, That the said James Ellis was not admitted, instituted, and inducted upon the presentation of Queen Eliz. as the Defendant hath alledged: And that the said Church the last of September 1633. vacavit per mortem of Will. W. . . the last Incumbent there, Et valet 200 l. per annum ultra Reprisas: And that the said Church is full of Thom. Yates ex presentatione Regis nunc: ideo consideratum est quod querentes recuperent presentationem suam versus Defendantem: Et habeant Breve to the Bishop of Peterborough: Quod non obstante reclamacione of the said Thom. Yates, ac licet the said Thom. Yates was admitted, instituted, and inducted into that Church, that he should amove the said Thom. Yates & idoneam personam ad presentationem of the Plaintiffs admittat sine dilatione: & consideratum est, That the Plaintiffs recuperent versus the said Thom. Yates damna sua pro valore Ecclesie pro dimidio anni secundum formam Statuti, which amounted to 100 l. Et prædictus Thom. Yates in misericordia. And upon this Judgement, Yates brings a Writ of Error, and assigns for Error, First, That the Plaintiffs in their Replication, traverse the admission, institution, and induction of James Ellis of the presentation of Queen Eliz. And hereupon issue joyned and tryed, where they ought to have traversed the seisin of Queen Eliz. & not the admission, &c. The second Error, Because Judgement was given for the Plaintiff, where it ought to have been for the Defendant. To these the Defendants pleaded, in nullo est erratum. And after divers arguments at the Barr, it was adjudged, That the traverse was good and well taken, and that the seisin in the Queen ought not to have been traversed; Whereupon Rule was given that Judgement should be affirmed. Vid. postea. 589.

Thorn *versus* Shering. Hill. 15 Car. rot. 588.

5. **T**Respasse de Clauso fracto. The Defendant justifies his entry by the command of J. S. The Plaintiff replies and shews, That J. S. was seized in fee and let unto him at will, and traverseth the command of J. S. The Defendant maintains, That J. S. commanded him to enter, and that he entered by his command, and traverseth the Lease at Will. And hereupon it being demurred, 'twas adjudged for the Plaintiff, That the command was traversable: And that the Defendants rejoinder to make a traverse upon a traverse, as this case is, was not good. Wherefore Judgement was given for the Plaintiff, Pasc. 38 Eliz. in Parkers Case, adjudged that the command is traversable.

Termo

Termino Michaelis, anno decimo sexto Caroli Regis,
in Banco Regis.

George Meade *versus* Sir John Lenthall.

Action upon the Case for disturbing him to execute the Office of Marshal of the Kings Bench, granted unto him by Patent for years. Upon Not guilty pleaded, and special Verdict found, The sole question was, Whether a Patent of this Office granted for years (which was the Plaintiffs title) be good or not? And it was argued by Jenkins and Maynard for the Plaintiff, and by Heath and Rolls for the Defendant. And after adjournment of the Court until this Term, it was agreed nullo contradicente, That Judgement should be given for the Defendant. And Brampton chief Justice delivered all their opinions to be so, principally for the reasons given in the case of Sir George Reignalds, Hill. 9. Jac. Cok. lib. 9. fol. 97. For this being an Office of great trust, and attendance continually in Court: great inconveniences would ensue if such Offices might be granted for years, which thereby might come in suspence upon probate of a Will, until administration were committed thereof: And it might fall, or be given to persons insufficient, of whom the Court could not conveniently admit: And where as it was objected, That it may be granted in Fee or in Tayle, &c. and so descend to an Infant, &c. and therefore for years. It was answered, That in such case, the Court hath used to put in another fit person for the time: And whereas it was objected, That Offices of Sheriffs were granted for years, until restrained by a Statute of 14 Ed. 3. It was answered, That those Grants were de facto, but it never was debated, what inconvenience might ensue by the granting of such Offices in that manner, which concern the Justice of the Kingdom and which require continual attendance.

Lodge *versus* Hollowell. Trin. 15 Car. placita Reg.

Information for the King, the City of London, and himself; For that the Defendant being a Currier bought two Hides of tanned Leather, each of them of the value of 16s. of persons unknown, and sold them unwrought, and not converted into made wares, to one James Mercer a Shoemaker in London, contra formam Statuti; whereupon he demands the third part of the said value for the King, the third part for the City of London, & the third part for himself. The Defendant pleaded Not guilty, and the Jury finde an especial Verdict, That the Defendant being a Citizen and Inhabitant of London, bought the said two Hides of persons unknown, and after

curried them with Dyle and Tallow and other things necessary, and after shaved & dyed them; and so being wrought, sold them to the said James Mercer a Shoemaker in London: And whether that be a buying and selling (not being otherwise, nor converted into made Wares) against the form of the Statute? they prayed the discretion, &c. and found them to be of the same value as in the Information, &c. And it was argued at the Barr by Rolls Serjeant, and Maynard for the Plaintiff, and by Mallet Serjeant, and Holbourn for the Defendant: And this Term by all the Court seriatim, Because it concerned a multitude of Curriers: And they all resolved, That it was an offence against the Statute of 1 Jac. cap. 22. and the value forfeited by the Statute, for this selling by a Currier not being cut out and made into Wares, is against the letter and meaning of the Statutes of 5 & 6 Ed. 6. cap. 15. 27 Eliz. cap. 16. & 1 Jac. cap. 22. All which were well weighed and considered, and this Information is grounded upon the Statute of 1 Jac. for it demands the third part, which none of the other Statutes gives. And the Statute of 5 Ed. 6. cap. 15. is perpetual, which expressly forbids all persons to Regrate for the buying & selling by whole sale, and all persons who were not Artificers, to convert Leather into made Wares: and this is a perpetual Statute, not repealed by any, unless by the Stat. of 1 Mariae sect. 2. which repeals 5 Ed. 6. as made and procured by the Shoemakers for their private gains: and the Curriers were restrained by the said Statute, and therefore the Statute of 1 Mariae repealed the Statute of 5 Ed. 6. and allowed Curriers to buy and sell Leather to Artificers who work it into made Wares: But this Statute of 1 Mariae was repealed by the Statute of 1 Eliz. cap. 8. which repeals eight several Statutes there mentioned concerning Leather, & expressly revives the Statute of 5 Ed. 6. (because by the repeal thereof Leather was dearer, Boots and Shoes and other Wares, sold at excessive prices to the undoing of many,) but only as to one clause therein, viz. That Shoemakers may sell Boots and Shoes and other Wares at Callis (which then in the time of Ed. 6. was English.) But now because that part of the said Statute was repealed, it shews that all other parts of the said Statute are continued, & especially the Statute of 27 Eliz. cap. 16. is expressly in the point, That Curriers by name shall not buy and sell tanned Leather, unless it be wrought & cut out, & converted into made Wares now used, or hereafter into made Wares. Which shews that Currying only is not accounted a converting into made Wares. And Berkeley cited Bracton who describes Ware to be made by cutting out & sowing, & converting them into another species, & the Statute of 1 Jac. repeals the Stat. of 1 Eliz. For it hath the same words no person or persons, &c. tanned Leather, &c. they who convert it into made Wares, &c. And although it was objected by Holbourn, That this Statute was never in ure against Curriers, but that currying and dressing hath been accounted made Wares by their Trades: It was answered, That those Statutes being

being in force and not repealed, the Currier was bound thereby and punishable, as it is held in the like case 4 Ed. 4. 1. & 1 H. 4. 38. Wherefore they all held, That a Currier may not sell nor buy by whole sale. But peradventure they may buy and sell in any other manner, not prohibited by any Statute as to Coachmakers, Joyners, and others for the making of Chaires and Stooles who use such Leather. And great inconvenience would ensue, if they should be permitted to buy and sell whole, not cut out, and made into some kinde of Wares; Wherefore it was adjudged for the Plaintiff.

Orme versus Pemberton.

The Plaintiff prayed to have a Writ granted to revoke Pemberton's election, who was chosen by the Parson of St. Katherine in Coleman-street, to be Clerk of the said Parish, whereas the Parishioners at their Vestry according to the custome of the Parish had elected the said Orme: And that the Court would direct them to admit the said Orme. And hereof the Court would advise, and appointed that presidents should be searched what hath been done in such cases, Trin. 21. Jac. A Prohibition was awarded against a Parson and Clerk, who sued in the Spiritual Court to be admitted, as elected by the Parson, and the other elected in the Vestry. 3.

Yates versus Sir John Dryden and others. Mich. 10. Car. rot. 1473. in Com. B. Ante pag. 585.

Error of a Judgment in the Common Bench, in a Quare Impedit: 4.
Where the Judgement being upon Verdict, Yates brings a Writ of Error, & hanging the Writ of Error, the King brings a Writ of Right of Advowson. And by motion to the Court, the proceedings in the Writ of Error were stayed, until the trial in the Writ of Right, & when the Mife was joyned upon the Right, who had best right, and thereupon special Verdict given, after Verdict one of the Tenants died: And the question was, Whether thereby the Writ should abate? And after long debating, it was resolved, and adjudged, That the Writ should abate in all: And afterwards the Court proceeded to the examination of the Errors. And the Court upon debate adjudged, That it was not erroneous, & gave Rule that Judgement should be affirmed, unless cause were shewn the first Monday of this Term: And then no cause being shewn, Rule was absolutely given, That Judgement should be affirmed. And in the interim, Yates exhibited a Bil in the Exchequer Chamber against the Defendants in the Writ of Error, & served them, and upon their answer obtained an order to stay that Suit, that they should not draw up the said Judgement, and served all the parties and their Counsel therewith: And afterward the said Yates served the Prothonotaries of this Court with this injunction, That they should not enter up the Judgement which the Court had command-
ed

ed to be entred up. And hereupon the Attorneys General exhibited a Plea, which was, That Margaret Gybbs held that Adowson in Coparcenery, with the other two Plaintiffs by Knights-Service, in capite & died seized, which descended to William Gibbs her Son and Heir, of full age, viz. of 27 years: And for want of his suing out Livery, it belonged to the King to present, And demanded Judgement si Executio. And all the Court held it to be no Plea, especially there being no Office produced finding the same: although the Attorney & Solicitor General much insisted, that a title appearing for the King, the Court ex Officio ought to award for the King, and relied upon 21 Ed. 3. 30. 12 H. 7. 12. That the King should have the Right of any Coparcener, and N. B. 38. that where a title appears for the King, the Court shall award a Writ to the Bishop for the King: Yet all the Court held, That here, as it is alledged, there is not any colour of Plea, but it ought to be rejected; for it is but matter in fact, especially in this Writ of Error, The Judgment being given in the Common Bench, & Execution for damages given in the case, and increased here by the Statute of 3 H. 7 which is not to be stopped, or the parties to be delayed by such bare surmises, not being ground upon any matter of Record. And it was afterwards argued at the Bar by Holbourn for the Defendants in the Writ of Error, and prayed that Judgment might be affirmed; For there is no colour for this Plea, nor any matter confessed of Record by pleading betwixt the parties, that the King hath title to present, For then, true it is, the Court ought to direct a Writ to the Bishop for the King ex officio as it is in 11 Hen. 4. by Fitzh. 38. 12 H. 12 9 H. 7. 9. 16 Hen. 7. 12. per Fineux. But when it doth not appear upon the same Record, there is not in such case any book which maintains that a Writ should be sent to the Bishop for the King. And where as it was here objected That the Verdict in the Writ of right of Adowson (being a Writ of the highest nature) should control the Verdict in the Quare impedit: For there the Verdict is, That the said James Ellis was not admitted, instituted and inducted ad Ecclesiam prædictam, ad presentationem dictæ nuper Regina Elizabeth. modo & forma prout the Defendant hath alledged, and the special Verdict in the Writ of Right finds, That the said James Ellis was admitted, instituted and inducted ad Ecclesiam prædictam ex presentatione dictæ nuper Elizabeth. Regina, which being a more high action destroys the former Verdict in the Quare impedit: And therefore the Judgment and Execution is thereby to be avoyded, as Banks Attorney general, & Herbert Solicitor general affirmed. Holbourn answered thereto, Admitting there had bin two contrary Verdicts, yet the first Verdict in the Quare Impedit, & Judgment thereupon, ought not to be avoyded unless by Error or attain: And whereas it was alledged, That where the said Verdict in the Writ of Right of Adowson found good title for the King, therefore the Court ex Officio ought to stay the awarding of entering Judgment upon the Quare Impedit, & ought to award a Writ to the Bishop for the King, He answered

answered admitting there had been a good and absolute title found therein for the King, yet being a collaterall Record, the Court should have no regard thereto, but ought to proceed in the Judgement to the reversal or affirmance thereof, in the Common Bench, that being their Commission, and no other: And he said, as this case now is, there being no generall but an especiall Verdict found; so as non constat what it is untill Judgement shall be given in the Writ of Error, That the said Judgement cannot now be given, and therefore it cannot avoid the first Judgement in the Quare impedit; because the Writ is abated by the death of one of the parties. And of this opinion was Berkeley and my self; for we have nothing to do but to reverse or affirme the Judgement, especially as this case is, where Judgement is given and damages and costs in the Quare impedit, against the Defendants there, and no colour to stay Execution thereof: And where damages are increased by this Court, the said Judgement being affirmed by the Statute of 3 H. 7. because the Writ of Error was in delay of Execution: And this Plea being matter of fact only, & demanding whether there ought to be Execution, there being no apparent Error assigned to reverse the Judgement, it cannot be good: And I insisted upon Hollands Case Mich. 40 & 41 Eliz. where it was agreed, That a Writ of Error is but a Commission to examine Errors, and there much doubted, what things might be assigned for Error, & therefore was of opinion that Judgement being entered, and damages and costs signed, it ought to be affirmed: But because the Atturney and Solicitor general were earnest to argue for the King. The Court gave them liberty to argue if they would, the Solicitor upon Monday 16. November, and the Atturney upon the Monday following: And the Atturney said, That he for the King was to argue last, and that none should argue after him. But I doubted thereof: Afterwards at the day appointed, the Atturney Generall argued very confidently, That no Writ ought to be awarded for the Plaintiffs to the Bishop in the Writ of Quare impedit. But that the Court, ex Officio ought to award a writ to the Bishop for the King: First, Because the Verdict in the Right of advowson (although it be an especiall Verdict) findes expressly contrary to the Verdict in the Quare impedit: And this being an Action of an higher nature ought to be believed; For the Verdict in the Quare impedit findes, That J. Ellis was not admitted, and instituted, upon the presentation of Queen Eliz. And the Verdict in the Right of Advowson findes, That Queen Eliz. anno ... non habens jus presentandi, presented the said J. Ellis who was admitted and instituted, to the said presentment of the Queen, which is expressly contrary to the Verdict in the Quare impedit, and destroys the Plaintiffs title; For the Queen had gained right against all, but him who had the true and very right: And the Verdict quod ad manus nostras, &c. is better than the other who hath no right: And the cases in 11 H. 4 71. and other Books before cited were vouched again, That where title appears for the King, the Record being in this Court, although the Writ is abated by death;

yet

yet there is a sufficient Record to entitle the King, whereof the Court ought to take notice, & he put many cases where by reason of Outlawry, or Felony the Court shall award the parties to be in execution. Secondly, he said, Although the grand Jury found that the D. had minus jus habendi præsentationem; yet for as much as the D. presented, she hath gained the possession, the admission, and institution of her Clerk, and hath majus jus than he who hath not any title; and it appeares not that the Plaintiffs have any title; wherefore he prayed that a Writ might be awarded for the King. But afterwards all the Court, seriatim, delivered their opinion, That the Plea pleaded is meerly void, being upon a surmise and without any Record shewn, as 4 H. 7. 5. Secondly, That the Verdict in the Writ of Right, being but a speciall Verdict, it doth not appeare (if the Writ had not abated by death,) whether Judgement should have been for the King, or for the Defendants: And as I conceived cleerly, Judgement ought to have been given for the Defendants; for the Verdict being that D. Eliz non habens jus presentandi, yet presented to the Abbowlson, as in suo pleno jure as the presentation mentions, it is a void presentment; For the D. was deceived in her presentment, which made it meerly void, as to the D. who can do no wrong: And the usurpation is only in the incumbent, procured himselfe to be instituted, And he is the wrong doer, & against him only the Quare impedit is alwayes brought, & no possession, or rather no right is gained unto the D. by such presentments by usurpation. But the other Justices doubted of this point: But they all resolved, That there ought to be a cleer title & right appeare for the King, & confessed by the parties in pleading, or otherwise fully apparent; for if not, the Court ought not to award a Writ, ex Officio, for the King: And as this case is there is not any cleer title appeares; for by death, the Writ of the Right of Abbowlson abated, & the Verdict of no force, & that there is no such contrariety, appeares by the Verdict, for the second Verdict, if it had been in force, is no concluding Record, but only an evidence, which may well be contradicted. But it was resolved by them all, Although the Verdict had been in force, & had been to the contrary, yet being here by Writ of Error, which is only to affirm or reverse the Judgement given in the Common Bench, they all agreed to affirm the Judgement, and that there was not any Error therein: And in the Judgement of the Common Bench, there being a Writ awarded to the Bishop to remove the said Yates, that Writ ought to be awarded; And neither Yates nor any other, who hath pretence of title after the Judgement, or pendant the same, can hinder, but that the Judgement and execution ought to passe: And for the damages which were given in the Common Bench, and for the increase given in this Court, for the delay of execution (where 700 l. damages and costs are given for delay of execution, by the Stat. 3 H. 7.) They were well given, are due to the Plaintiffs who survived: And the death of one of the Plaintiffs doth not alter the case; Whereupon Judgement was affirmed and Writ awarded to the Bishop.

Richard

Richard Lees Case.

The same day being Saturday, Richard Lee and seven others ^{5.} were brought upon an Habeas Corpus from Colchester. And it was returned, That they were committed there to Gaol being Anabaptists, using Conventicles, and absenting themselves from all parochial Churches, and baptizing and preaching, being all mechanical persons, viz. Taylors, Weavers, and such like: And it being proved by their own confessions, That one of their company of the age of 60. years, utterly disallowed of the Administration of the Sacraments, by the Ministers of our Church; Whereupon an Endicement being found at the Sessions of the Peace holden at Chelmsford for the County of Essex, for their absence from Church for a moneth, and resorting to Conventicles, against the Stat. of 35. Eliz. cap. 1. made against such persons, they being severally arraigned, thereupon pleaded Not guilty modo & forma; which being returned, a tryal was appointed to be at the Barr upon Tuesday 24. November following: And the Statute was read unto them, because they pretended there was not any such Statute made against them, or that they knew of any such Statute, but only against Recusants; And the Court advised them to consider thereof and timely to prevent the penalty which would ensue upon conviction; In the mean time they were appointed to be bailed, and to appear at the said day of triall, and in the interim to be of good behaviour.

Brices Case.

Brice being committed by the Earl of Denby, brought his Habeas Corpus; And it being returned, That he was committed to the Gaol of Oxon by the said Earl (to remain there without bail or mainprize until he were delivered by the Justices in Eyre, It was ordered he should be bailed for 12. dayes, and that in the interim they should amend the return; For the return being generall and no special cause shewn, It was held to be absolutely void: And if the return were not amended, and good cause shewn at the day, It was ordered that he should be absolutely dismissed.

Derby *versus* Hemming. Hill. 15. Car. rot.

Error of a Judgement in the Common Bench in Debt upon an ^{7.} obligation of 100l. conditioned for the payment of 51l. 6s. 8d. The Defendant pleaded, That he paid the foresaid 51l. 6s. 8d. at the day (so mistook 21l. for 51l.) The Plaintiff replies, That he did not pay the said 51l. 6s. 8d. at the day in the condition, prout the Defendant hath pleaded, Et hoc petit quod, &c. & Defendens similiter. And upon this Verdict and Judgement for the Plaintiff, it was now assigned for Error; for that the Defendant pleads payment of 21 l. 6 s. 8 d. And the Plaintiff saith, non solvit the said 51 l. 6 s. 8 d. Et hoc, &c. so there is not any issue. And the Court doubted

f f f

herein,

herein, If their might be a Repleader. But because it was adjudg. in the Common Bench, no issue being joyned and damages and costs given, it was held, there might not be Repleader. And it was reversed.

Pelham versus Hemming. Hill. 15 Car. rot. 999.

8. **E**rror of a Judgement in the Common Bench, in Debt upon an obligation of 100l. conditioned, That if Henry Hemming or Robert Hemming the Defendant, paid 51 l. 6s. 8d. to Sir Robert Napper such a day, then it should be void. The Defendant pleads, solvit ad diem, and found against him, & Judgement for the Plaintiff, quod recuperet debitum & damn, &c. against the said Robert, & prædictus Henricus in misericordia where it should have been Robertus; for Henry was no party to the Record. And Maynard for the Plaintiff assigned this ore tenus for Error. And all the Court held, That this entry is but mispision of the Clerk; Wherefore it was ruled, that it should be amended and the Judgement affirmed.

Watkinson and Joan his Wife versus Turnor.

9. **E**rror of a Judgement in the Common Bench in Battery, against the Baron and Feme, Where the Defendant Watkinson pleaded generally Not guilty, and the Baron and Feme, quoad the wounding, pleaded Non culp. and quoad the Battery, the Feme pleaded Justification, and concludes with an Averment, Et hoc parata est verificare, where it ought to have been parati sunt verificare. And this being assigned for Error, ore tenus, the Court much doubted whether it were good; for the Baron ought to have joyned with the Wife; Wherefore they all would advise and see the presidents in the Common Bench, in this point.

Tregose versus Wennel. Mich. 15 Car. rot. 226.

10. **E**rror of a Judgement in the Common Bench in Replevin, brought in the Hundred Court by plaint, and removed into the Common Bench by Recordare facias loquelam. The Error was assigned, because it doth not appear, That Pledges were returned upon the plaint; and it was much insisted upon at the Barr, That this was Error, and relyed upon Husseys Case, Co. 9. 71. And all the Court agreed according to the said Case; That if upon the original writ Pledges be not returned (because the writ commands, That if Pledges be found, That then, &c. and it is to the Kings disadvantage if Pledges be not found, as the loss of his Fine) it was Error; but whether it be so in this Case was much doubted, because the Sheriff may make Replevin without Pledges finding: And here the Error is of the Judgement in the Common Bench, and it is no Error in them: And peradventure Pledges were found and not returned, & it is at the Sheriffs peril if he doth not take Pledges, according to the Statute of Westmin. 2. cap. 2.

Memorandum

M*emorandum*, That upon the sixth of November this Term the 11.
 Lord Keeper of the Great Seal, the Lord Treasurer, the
 Lord Privie Seal, Earl of *Arundell* Earl Marshall, the Earl of *Pem-*
broke Lord Chamberlain, the Lord *Cottingham* Chancellor of the
 Exchequer, and all the Justices of both Benches, and Barons of the
 Exchequer, were assembled in the Exchequer Chamber to nominate
 three persons, of every County throughout *England*, to be presented
 to the King, that he might prick one of them to be Sheriff of every
 County, which is usually done according to the Statute, upon the
 third of November being *Crastino animarum*. But because it was the
 first day of the Parliament, and the Lords were to attend upon the
 King, it was resolved, by the advise and resolution of the major part
 of the Justices, with whom conference was had in this cause, that
 it might be well put off to another day: And the Lord Keeper,
 notwithstanding the Statute, deferred it untill this day.

Sloper versus Child.

E*rror*. The Error assigned was, That in the Writ of *Venire* 12.
facias awarded to the Sheriff of Somersetshire, the word *Vice-*
comiti was omitted; yet the Sheriff of Somersetshire returned the
 Panell, & his name was indorsed. And after *Habeas Corpora Jura-*
torum, the Jury appearing, the Verdict & Judgement was for the
 Plaintiff, and this Error being assigned, it was held a cleer Error:
 But because upon the Roll, The Writ was awarded *Viccom.*
Somerl. and the omittance of the Sheriff is the fault of the Clerk;
 Therefore all the Justices agreed, That it ought to be amended,
 and that the Judgement should be affirmed, unless, &c.

Sir Henry Williams Case.

S*IR* Henry Williams prayed a Prohibition to the Council of 13.
 the Marches of Wales, because he was sued there for a Lega-
 cie above the value of 50 l. viz 60 l. and it was answered at the
 Barr, That their instructions were to hold plea of Legacies of any
 summe; but the Court doubted thereof, whether such instructions
 should be good to warrant their proceedings, because Causes testa-
 mentary and Legacies are suable in the spirituall Court, and not
 elsewhere, notwithstanding their instruction: For they cannot
 warrant that which is not according to Law: And the Statute of
 34 Hen. 8. warrants that Court.

Calmadies Case.

C*Almady* prayed a Prohibition to the Court of Requests, for 14.
 that in an Action of *Trover* for divers goods, after Verdict and
 Judgement in this Court, & affirmed in a Writ of Error, the De-
 fendant surnised matter of equity, and that he was surprised in the
 Triall and had not his Witnesses there, having had two Verdicts
 before against this Triall. The question being upon Sale by the
 ffff 2 Commis.

Commissioners upon the Statute of Bankrupts: Whereupon a Prohibition was granted, & the Court resolved, that so they would alwayes doe when ever any exhibited Bills there after Ardict and Judgement. Trin. 14 Eliz. rot. 1157. Flood versus Stepney in the Common Bench, Where dures was pleaded unto a Bond; and afterwards an Attachment issued out of the Court of Requests against the Defendant, and it was held to be a good Plea, and there resolved, That the Court of Requests cannot grant an Attachment of contempt: And in 37 Eliz. it was agreed per totam Curiam to be against Law, That the Court of Requests should commit any: And in 40 Eliz. in this Court, Austen versus Breerton, in an Action and Judgement for the Plaintiff, the Defendant sued in the Court of Requests to be relieved. This Court upon examination did bayl the party, and Sir Thomas Gawdy was convented before the Queen for it; yet notwithstanding it was held good enough, and Breerton was enforced to satisfie the said Judgement.

Anonymus.

15. **P**rohibition was prayed, For that one J. S. (who was a Curate and Sequestrator of the Rectory of D. in London, by reason that Mr. Walker, for contumacie and other causes, was suspended from exercising his function there) sued four of the Parishioners in the spirituall Court for Tythes of their houses, & not before the Major, according to the Decree and the Statute of 37 Hen. 8. For they ought clearly to sue before the Major of London, and not in the Ecclesiasticall Court; And therefore divers Prohibitions have been granted; but whether in this case it was grantable, the said J. S. being neither Parson nor Vicar, was the doubt. And it was moved at the Barre, That for houses, Tythes ought not to be paid, unless there be a speciall Custome, as in Cok. lib. 11. fol. 16. Doctor Grants Case, is clearly resolved; and the Statute is inductive of a new Law, and thereby is appointed how it shall be ruled, and before what Judges, and what remedy shall be for the party grieved, unless their order be obeyed; and then he may not sue in another place, nor before other Judges then the said Statute appoints: And if Prohibition should not be admitted for suing, it should be a defrauding of the Statute, and would make it of none effect; wherefore the Court doubted, and would further advise, and gave day to hear counsell on both sides.

Sir Mathew Mints Case.

16. **U**pon the 14. of November 1640. Sir Mathew Mints alias Ments, Knight of the Bath (who was convicted of Manslaughter of one Weeks, who was his Servant, by beating or correcting of him, whereby he was so bruised, that he instantly died) and had his Clergie and his burning in the hand, was re-
spited:

spited: And now he pleaded his Pardon, whereby the burning in the hand for the Manslaughter, and all other Fellonies committed by him, & alia Malefacta, before the eighth of July last, were pardoned; And there was an especiall clause, That he should not finde Sureties for his good behaviour; and the Pardon bore date 31. Octob. last: And although there were divers misdemeanors committed by him after the said eighth day of July, for which he deserved to be bound to the good behaviour; Yet he had his Pardon allowed, and was discharged from finding Sureties, &c.

Aspye versus.

Prohibition was prayed to be awarded to the Councell of the 17.
Marches of Wales, where it was by bill suggested. That a Copyholder in fee surrendred into the hands of such a Tenant such a Tenement, held of the said Manor by the veirge, to the use of the Plaintiff; And that Pembridge the Steward of the Manor refused to admit him, and there prayed that he might be compelled to admit him, Whereunto the Defendant pleaded that the custome of the Manor is to surrender into the hands of two Tenants, and that the said Surrender ought to be done by the Veirge: And this Surrender was only by a Knife, sitting at the Table, and into the hands of one Tenant only; And that he who made this Surrender was dead; and his Heir alledging that this Surrender was void, desired to be admitted, and was admitted: And that notwithstanding this answer, they proceeded to try the Custome, which is tryable onely at the Common Law, Whereupon a Prohibition was granted.

Sherman versus Lylly. Hill. 15 Car. rot. 1198.

Debt upon an Obligation of 200 l. conditioned, That where- 18.
as Lylly had married such a woman, being a Widow. If the Defendant should permit his said Wife to make a Will of her Husbands goods, to the value of 100 l. to be paid within one year after her decease, That then, &c. The Defendant pleaded, That he permitted his said Wife to make a Will; And thereupon the Plaintiff demurred, and Rolls Serjeant said, That he ought to have pleaded, That he paid accordingly; for otherwise he doth not answer to the Condition, but only to one part thereof. And of that opinion was all the Court; For To be paid is all one with And to pay, otherwise it is an idle thing to permit her to make a Will, if he doth not pay; And therefore they all held, That the Plea was ill; Wherefore it was adjudged for the Plaintiff.

Burwell versus Harwell. Hill. 15 Car. rot. 197.

Replevin. The question upon demurrer was, First, Whether 19.
the Grantee of a Rent charge, by the Conusor of a Statute, after

after the Statute acknowledged, and after the time of the extent of the Statute, averring that the Debt, Damages, and Costs are satisfied, may distrain for the rent and arrearages without suing a Scire facias? And after argument at the Barr on both sides, Berkeley Justice delivered his opinion, That the distress was lawfull, without a Scire facias; For he did not meddle with the possession, but distrained for his rent: And he put a difference where a man makes a gift in tail, reserving a Rent; and where a Donor grants a Rent out of a Reversion, in the one case the Rent may be docted and barred by recovery against Tenant in tail; but in the other case it cannot be destroyed by recovery, but the Rent shall remain, at least as a Rent-seck, &c. And Brampton said, peradventure he might enter and distrain: For where a man hath *Profits a prender*, as Common for twenty Beasts, or twenty loads of *Estover* every year, if he might not have them untill Scire facias, he should be at a great mischief. And I was of the same opinion, That he might distrain, if he at his perill will take notice, That the Extent is determined, and the Debt, Damages and Costs levied: And he cannot have a Scire facias because he hath no title by Record whereupon to ground a Scire facias. The second Question upon the demurrer was, Whether one who claims by the Conusor by Fine or other Record, may maintain a distress without a Scire facias ad computandum, as 38 Ed. 3. 12. 25 Ed. 3. 1. & 37. And in Michaelmas Term following it was argued again by Shaftoe for the Avowant, That the distress was lawfull, and that he might well maintain it, without a Scire facias ad computandum. And Rolls Serjeant for the Plaintiff much insisted, That for as much as the Conusee comes in by matter of Record, That without matter of Record he cannot be ousted by one who claims under the Conusor: And therefore the Grantee cannot distrain without first suing a Scire Facias. Berkeley answered, That true it is, none who claims Estate in Land under the Conusor, after the Statute acknowledged, can enter or avoid the Extent, without a Scire facias or Venire facias ad computandum; wherein, if it appears that he hath taken the profits of the Land after the time of the Extent satisfied, he shall be allowed for them, & shall answer for the profits so tortiously taken. But Grantee of a Rent, after the Extent satisfied, may well distrain, so may Grantee of a Common; for they claim no interest in the Land, but profits out thereof; wherefore he cannot have a Scire facias or a Venire facias ad computandum; for he ought not to account with them, and therefore may distrain or put in his Cattel to take the profits otherwise he should be without remedy, for which, &c. And I was of the same opinion; And that the Rule holds not alwayes good, that where one comes in by matter of Record, he ought not to be ousted without a Scire facias or matter of Record: For he whole Lands are extended upon an Elegit upon a Recognisance, after the Debts be satisfied, may enter without Scire facias; but the Conusee of a Statute (because he is to have

Costs

Cotts or Damages, which be not known cannot be *ousted* without a Scire facias, wherefoze, &c. And, the others Justices being absent, Rule was given, That Judgement should be entred for the Avowant, unless, &c.

..... *versus* Stringer. Hil. 15 Car. Rot. 2.

T Respals for breaking his Close in Culham, &c. The Defen- 20.
dant pleads, quoad the breaking of parcel thereof in Culham, containing 42. acres, That Sir John Prisot and his Wife were seized of the Manor of Culham, and of the said 42. acres, parcell of the said Manor, and of a Messuage and two Pard-lands, parcell of the said Manor, in right of his Wife, for her life, Remainder over to J. S. And that they joyned in a Fine *sur Conscience de droit come ceo* &c. of the said Messuage, and two Pard-lands to the Defendant, and granted them to the Defendant and his Heires; and further by the said Fine, granted unto him Common for four Horses and five Beasts, and two hundred Sheep in the said Manor and Lands in Culham, and averss the life of the said Baron, and that he put in his Cattel to use the Common, &c. And quoad his breaking the other part of the Close he pleads, and shews a Lease for 99. years. Upon these Pleas the Plaintiff demurred, and it was shewn for cause, That the first Plea is not good, because he doth not plead, That it was Waste or Common, &c. otherwise he might not claim Common, unless in Land commonable: But Berkeley and my self held, That it was no cause of exception; but by the Plea (as the Fine is) he may claim Common in any part of the Manor; For there is not any restraint to the Wastes or Commons, but it is granted generally in his Manor, and not like to the Case in 9. H. 6. Grant of Common ubicunque & quodocunque averia sua ierint for there he ought to averre that the Cattle of the Grantor went in the same place: But Berkeley said, the clause of Quodocunque averia sua ierint is void, because it restrains all the effect of the Grant; For if the Grantor will not in his Cattel, he never shall have his Common: But I held the said restraint to be good; For he shall not have it, but when the Grantor hath Cattel there; and he is not totally restrained: And Modus & conventio vincunt legem; For it is not intendable, That the Grantor would totally forbear to put in his Cattel to defraud the Commoner of his Common: But for the principal point we both agreed *ceteris Justiciariis absentibus*) to give Judgement for the Defendant, That that part of the Plea was good. But for the other part, wherein the Lessee prescribes to have Common, it is cleerly ill; Wherefoze it was adjudged for the Plaintiff, that this Plea was not good.



Termo Hillarii, anno decimo sexto Caroli Regis,
in Banco Regis.

1. **M**emorandum, That Sir William Jones Knight one of the Justices of the Kings Bench, died at his house in *Holbourn* upon the ninth of December, and according to his own appointment, was buried in the Walks under *Lincolns-Inn*, Chappel; And Sir Robert Heath one of the Kings Serjeants, was appointed to be Justices of the Kings Bench in his place. And upon the first Tuesday in Term, the said Sir Robert Heath was sworn Justice of the Kings Bench.
2. **M**emorandum, That the first day of this Term, being Saturday, Sir Edward Littleton Knight, who was chief Justice of the Common Bench, was designed and appointed to be Lord Keeper of the great Seal; And (having had the Seal delivered unto him by the King, at *Whitehall* the Wednesday before, and sworn there the same day to be Lord Keeper thereof, by the Lord Treasurer, & the Earle of *Pembroke* Lord Chamberlain) signed divers Writs, in the interim betwixt that and the Term. And Sir John Banks Attorney Generall, was designed by the King to be chief Justice of the Common Bench; And divers Lords and others accompanied him to *Westminster*: And all the Justices, and Barons, and Master of the Rolls attended the said Lord Keeper to *Westminster*, and yet notwithstanding he continued chief Justice of the Common Bench; And upon Wednesday, *Quindena Hillarii*, the said Lord Keeper sat in the Common Bench, as chief Justice there, not in his Robes, but in his long Gown and Hat, as the Lord Keeper useth to sit, and swore a Philizer there, which Office he gave as chief Justice of the Common Bench, and afterwards went into Chancery: And then Sir John Banks appeared before him, by virtue of a Writ returned unto him, to take the degree of a Serjeant at Law: And after a speech made unto him by the Lord Keeper, and his answer of humble thanks to the King for his grace and favour, he was sworn Serjeant; and after went into the Kings Bench, and made a motion within the Barre as Kings Attorney; And the next day, being Thursday, he performed his Ceremonies in *Serjeants-Inn-Hall* in *Fleetstreet*, & went unto *Westminster* in his party coloured Robes, with the Warden of the Fleet, and other Officers attending upon him, and kept his Feast in *Serjeants-Inn-Hall*; And the next day, being Friday, he was sworn chief Justice of the Common Bench; And afterwards, the same day, Herbert the Kings Solicitor was made Attorney General, and Mr. St. John of *Lincolns-Inn* was made the Kings Solicitor.

Chambers *versus* Sir Edward Brumfeild, late Major of London.

TRespas of false Imprisonment, for committing the Plaintiff to the Prison at Newgate. The Defendant justifies by virtue of the Kings Writ, dated 4. Aug. 11 Caroli, for not paying of money assessed upon him, towards finding of a Ship. And being argued at the Barre this Term, it was now moved to have Judgment without any further argument, Because it had been voted and resolved in the Upper-house and the House of Commons, nullo contradicente, That the said Writ, and what was done by colour thereof, was illegal; therefore the Court would no further dispute thereof, but gave Judgment for the Plaintiff.

3.

The Lord Greys Case.

Memorandum, That in this Parliament a Question was moved concerning the Barony of *Ruthen*, where the Case was, That one being created a Baron to him and his Heirs, hath Issue a Son and a Daughter by one *Venter*, and a second Son by another *Venter*, and the eldest Son hath the Barony, and sits in Parliament, and afterward dies without Issue, Whether the second Son shall have that dignity as Heir to his Father, Or the Sister shall have it as *possessio Fratris*, in Lands, &c. and desired to have the opinion of the Judges therein? And all the Justices resolved, That there is not any *possessio Fratris* of a dignity, but it shall descend to the Son; For the younger Son is *Hares natus*, and the Sister is only *Hares facta* by the possession of her Brother, of such things as are in demeasne, but not of Dignities and such like, whereof there cannot be an Acquisition of the possession, according to *Co. Litt. 17. & Cok. lib. 3. fol. 37. Ratcliff's Case.*

4.

Gertrude Bacon *versus* James Bacon and three others.
Trin. 16. Car. Rot. 456.

TRespas of his Crosse breaking in Cramford. Upon Not guilty pleaded, a speciall Verdict was found, That Thomas Bacon, late of Cramford aforesaid, was seized in Fee of the Tenements in the Declaration mentioned, & had issue John and Thomas, and 15. Octob. anno 1610. died so seized, which descended to the said John; who, being a Merchant, went beyond Seas to Elvin in Prussia, which is in the Dominions of the King of Poland, ad Merchandizandum, and used the Trade of a Merchant there; and during his trading, espoused there Elizabeth the daughter of Francis Cockley an English man, who exercised the Trade of a Merchant in partibus transmarinis: And that 31. August 1615. the said John Bacon died, the said Elizabeth his wife being *grossment enscint* with the said Gertrude now the Plaintiff, which Gertrude was born the 31. Octob. 1615. apud Elvin aforesaid;

5.

¶ g g g

And

And that the said Thom. Bacon was brother of the whole blood to the said John; and that the Plaintiff is the sole daughter and issue of the said John; and that she, the Plaintiff, entred into the said Tenements, and was seised, prout Lex postulat. And the said James, as Son & Heir of the said Thomas Bacon, entred and ousted her, and continued the possession, prout in the Declaration, &c. Et si super totam materiam, &c. the Court shall adjudge for the Plaintiff, they find for the Plaintiff, and assess Damages 12 s. and Costs; And if, &c. This being argued at the Barre, Brampton, Berkeley, and my Self agreed, That Judgment shou'd be given for the Plaintiff: For her Father being an English Merchant and living beyond the Seas for Merchandizing, his Daughter is born a Denizen, and shall be Heir unto him: And it is not material although his Wife be an Alien, for she is, as Berkeley said, sub potestate Viri, and quasi under the Allegiance of our King: And, as Brampton said, although the Civil Law is, That pater sequitur ventrem, yet it is not so in our Law; but the child shall be of the Fathers condition: And he being an English Merchant, and residing there for Merchandizing, his Children shall, by the Common Law; or rather, as Berkeley said, by the Statute of 25 Ed. 3. be accounted the Kings Leiges, as their Father is. And they all agreed the sooner in this opinion, by reason of a Case bouched to be adjudged secundo Car. which I remember was argued in the Dutchy Court, before Hobart and Yelverton Justices, assisting there, where one Stephens, being a Merchant, went over the Seas, and resided for his Merchandizing, and there had Children, they resolved, by the advice of the other Justices, That those Children were Denizens: And it is entred there accordingly. And so in this Case it was agreed, and Judgment was given for the Plaintiff.

Prinors Case.

6. Edward Prinor, Constable of Offenham, was brought into Court upon an Attachment of contempt; Where it appeared by his Examination, That he had arrested one Anth. Haslewood Esq; in the Churchyard, upon a Sunday, as he came from divine Service, by a Process for the Good-behaviour, out of the Sessions, when the said Anthony Haslewood shewed him, that he had a Cerciorari out of this Court. But he pretending he could not read, arrested and detained him, untill he went unto another house, & procured it to be read to the said Prinor, who then discharged him. And for this contempt, because he was arrested upon a Sunday, immediately after divine-service, whereas he might have arrested him upon any day of the week, the said Prinor was fined 20 s. And for arresting & detaining him after the Writ of Cerciorari shew'd (his ignorance not excusing him) he was ordered to be bound with Sureties to the Good-behaviour: But the fine and imprisonment were discharged, Because the Arrest was by Process of the Sessions of Peace,

Peace, although the Court declared, It was not well awarded according to the Statute of 21 Jacobi.

Kings versus Hilton and his Wife, Trin. 16 Car.

DEbt against *Baron and Feme, Administratrix* of her former Husband. Judgment being given against them, upon a Fieri facias, the Sherif returned Nulla Bona, &c. of the Intestate. Hereupon another Fieri facias was awarded against the *Baron and Feme*, with a clause in the Writ, That if it be found, that the said *Baron and Feme* devastaverunt Bona & si constari poterit tunc fieri facias, &c. Vide Cok. Rep. lib. 5. fol. 32. Petifers Case. And the Sherif returned, that they had not in their hands any of the Goods of the Intestate: But that the *Feme*, being Administratrix to her first Husband, had goods of the value of 100 l. of the said Intestates, and had wasted them during her Widowhood, and the Husband had not wasted any of them: Et si devastaverunt according to the Writ, the Jury prayed the discretion of the Court. And it was argued by Rolls, Serjeant, for the Plaintiff, That it was a debastation in both. And the Court held, That the Sheriffs return of the Enquisition, finding this matter, was good enough: Wherefore it was adjudged for the Plaintiff.

7.

Ball versus Trelawny, Pasch. 16 Car.

Bill against the Defendant in custodia Mareschalli, upon the Statute of 2 Hen. 4. cap. 11. for suing in the Admirall Court upon a Contract made on the Land at New England, & not super altum Mare; where the Defendant had obtained Judgment in the Admirall Court, and taken the party in execution for 112 l. And after Verdict here found for the Plaintiff, Hales moved in arrest of Judgment, first, For that the Suit is by Bill, and not by original Writ, as the Statute appoints: But in regard it was returned, That he was in custodia Mareschalli, and he could not otherwise have his remedy, It was held to be well enough. Secondly, for that, being at New-England, it was not alledged to be in partibus transmarinis. And the Court, viz. Brampton, Berkeley, Heath, and my Self, held, That it is out of the Admiralls Jurisdiction, and that he hath no authority to meddle therewith: Wherefore it was adjudged for the Plaintiff. And the Friday following, he appearing upon an Habeas Corpus, and this cause returned; and that he was in execution for this cause only, (which they held to be coram non Judice) the party was discharged.

8.

Die Martis 12° Novembris 1667.

UPon a Report made by Mr. *Vaughan* from the Committee concerning Freedom of Speech in Parliament.

Resolved, &c.

That the House do agree with the Committee, That the Act of Parliament in 4 Hen. 8. commonly entituled an Act concerning Richard Strowd, is a General Law extending to indemnifie all and every the Members of both Houses of Parliament, in all Parliaments, for and touching any Bills, speaking, reasoning, or declaring of any matter or matters in and concerning the Parliament to be communed and treated of, and is a Declaratory Law of the Antient and necessary Rights and Priviledges of Parliament.

Die Sabbati 23° Novembris 1667.

Resolved, &c.

That the Judgment given 5 Car. against Sir John Eliot, Denzell Hollis, and Benjamin Valentine in the Kings Bench is an illegal Judgment, and against the freedom and Privilege of Parliament.

Die Sabbati 7° Decembris 1667.

Resolved, &c.

That the Concurrence of the Lords be desired to the Votes of this House concerning Freedom of Speech in Parliament, and that a Conference be on Monday next desired to be had with the Lords, at which time the Votes may be delibered, and reasons for them given.

Die Jovis 12° Decembris 1667.

A Message from the Lords by Sir William Childe and Sir Thomas Estcourt.

Mr. Speaker,

The Lords have Commanded us to acquaint you, that they agree with this House in the Votes delibered them at the last Conference concerning Freedom of Speech in Parliament.

Die

Die Mercurii 11^o Decembris 1667.

NExt the Lord Chamberlain and the Lord *Ashley* reported the effect of the Conference with the House of Commons yesterday, which was managed by Mr. *Vaughan*, who said he was commanded by the House of Commons, to acquaint their Lordships with some Resolves of their House concerning the Freedom of Speech in Parliament, And to desire their Lordships concurrence therein.

In order to which he was to acquaint their Lordships with the reasons that induced the House of Commons to pass those Resolves.

He said the House of Commons was accidentally informed of certain Books published under the name of *Sir George Crokes Reports*, in one of which there was a Case published, which did very much concerne this great Priviledge of Parliament. And which passing from hand to hand amongst the men of the long Robe, might come in time to be a received opinion as good Law.

The House of Commons considering the consequence, did take care that this Case might be inquired into, and caused the Book to be produced, and read in their House, and he thought it the next and clearest way to informe their Lordships, is to read the case it self, which is *Quinto Caroli primi Michaelmas Terme*, which Case was read as followeth,

The King *versus* Sir John Elliot, Denzell Holles,
and Benjamin Valentine.

AN Information was exhibited against them by the Attourney Generall, reciting, That a Parliament was summoned to be held at Westminster 17 Martii. 3 Caroli Regis ibidem inchoat. And that Sir John Elliot was duely elected and returned Knight for the County of Cornwall, and the other two Burgeses of Parliament for other places; And Sir John Finch chosen Speaker. That Sir John Elliot machinans & intendens omnibus viis & modis seminare & excitare discord, evil will, murmurings, and seditious, as well versus Regem Magnates Prelatos Proceros & Justiciarios, & reliquos Subjectos Regis, & totaliter deprivare & subvertare Regimen & gubernationem Regni *Angliae*, tam in Domino Rege quam in Conciliariis & Ministris suis cujuscunque generis, & introducere tumultum & confusionem in all estates and parts, & ad intentionem, that all the Kings Subjects should withdraw their affections from the King, the 23th of Febr. Anno 4 Car. in the Parliament, and hearing of the Commons, falso, malitiose, & seditiose used these words, The Kings Privy Council, his Judges, and his Council learned, have conspired together to trample under their feet the Liberties of the Subjects of this Realm, and the Liberties of this House.

H h h h

And

And afterwards upon the second of March Anno 4. aforesaid, the King appointed the Parliament to be adjourned untill the 10th of March next following, and so signified his pleasure to the House of Commons; And that the Three Defendants the said second day of March 4 Car. maliciously agreed, and amongst themselves conspired to disturb and distract the Commons, that they should not adjourn themselves according to the Kings pleasure before signified; And that the said Sir John Elliot according to the agreement and conspiracy aforesaid had maliciously in propositum & intentionem prædictam in the House of Commons aforesaid spoken these false, pernicious, and seditious words precedent, &c. And that the said Denzell Holles, according to the agreement and conspiracy aforesaid between him and the other Defendants, then and there also, maliciously, & seditiously uttered hæc falsa, maliciosa & scandalosa verba precedentia, &c. And that the said Denzell Holles, and Benjamin Valentine secundum agreementum & conspirationem prædict, &c. ad intentionem & propositum prædict, uttered the said words upon the said second day of March, after the signifying the Kings pleasure to adjourn; And the said Sir John Finch, the Speaker, endeavoured to get out of the Chair, according to the Kings Command, They vi & armis manu forti & illicito assaulted, evil intreated, and forcibly detained him in the Chair; and afterwards being out of the Chair they assaulted him in the House, and evil entreated him, & violenter manu forti & illicito drew him to the Chair, and thrust him into it. Whereupon there was great tumult and commotion in the House, to the great terror of the Commons there assembled, against their Allegiance in maximum contemptum, and to the dishonour of the King, his Crown and Dignity, for which &c. To this Information the Defendants appearing, pleaded to the Jurisdiction of this Court, That the Court ought not to have Conusance thereof, because it is for offences done in Parliament, and ought to be there examined and punished and not elsewhere. It was thereupon demurred, and after argument adjudged, That they ought to answer, for the charge is for conspiracy, seditious acts and practices, to stop the adjournment of the Parliament, which may be examined out of Parliament, being seditious and unlawful Acts; and this Court may take Conusance and punish them; afterwards divers Rules being given against them, viz. Sir John Elliot, that he should be committed to the Tower, and should pay 2000 l. Fine, and upon his enlargement should find Sureties for his good behaviour; And against Holles, that he should pay a thousand Marks, and should be imprisoned, and find Sureties, &c. And against Valentine, that he should pay 500 l. Fine, be imprisoned and find Sureties.

Then Mr. Vaughan laid much Emphasis upon the words *Machinans & intendens*, &c. and then went on, That the House of Commons had

had not only read the Case as it was in the Book, but did look into the Record, where in the Information it self they found some considerable differences from the Print, As that the Crime alledged consisting partly of Words spoken in the House, partly of Criminal Actions pretended to be committed; The Gentlemen accused, Pleaded severally, namely specially to the Words, and a several Plea apart to the Criminal Actions; But the Court dealt so craftily that they over-ruled the whole Plea, mingled together and took it in General, so that perhaps whatsoever was Criminal in the Actions might serve for a Justification of their Rule, and might make it seem in time to come a President, and a Ruled Case against the liberty of Speech in Parliament, which they durst not singly and bare-fac'd have done.

The House of Commons did take care to enquire what Antient Lawes did fortifie this the greatest Priviledge of both Houses, and they found in the fourth year of *Henry the Eighth*, An Act concerning one *Richard Stroude*, who was a Member of Parliament, and was fined at the Stannery Courts in the West for condescending and agreeing with other Members of the House to passe certain Acts to the prejudice of the *Stanneries*; This Act was made occasionally for him but did reach to every Member of Parliament that then was, or shall be; The very words being, viz.

And over that it be Enacted by the same Authority that all Suites, Accusements, Condemnations, Executions, Fines, Amercements, Punishments, Corrections, Greivances, Charges and Impositions, put or had, or hereafter to be put or had unto, or upon the said Richard, and to every other of the person or persons afore-specified that now be of this present Parliament, or that of any Parliament hereafter, shall be for any Bill, Speaking, Reasoning or Declaring of any Matter or Matters concerning the Parliament to be commenced and treated of, be utterly void, and of none effect. And over that, Be it Enacted by the said Authority, That if the said Richard Stroud, or any of all the said other Person or Persons hereafter be vexed, troubled, or otherwise charged for any causes as is aforesaid, that then he or they, and every of them so vexed or troubled as or for the same, to have Action upon the Case against every such Person or Persons so vexing or troubling any, contrary to this Ordinance and Prohibition in the which Action the Party grieved shall recover treble Damgages and Costs, and that no Protection, Effoyne, nor wager of Law in the said Action in any wise be Admitted nor received.

He said, 'tis very possible the Plea of those worthy persons, *Denzell Holles*, Sir *John Elliot*, and the rest, was not sufficient to the Jurisdiction of the Court, if you take in their Criminal Actions altogether; but, as to the Words spoken in Parliament the Court could have no Jurisdiction whilst this Act of 4 Hen. 8. is in force; which extends to all Members that then were (or ever should be) as
well

well as *Strowd*; and was a Publick General Law though made upon a Private and a Particular occasion.

He recommended to their Lordships the consideration of the time when these Words in the Case of Sir *George Crokes* Reports were spoken, which was the second of *March*, 4 *Carol. primi*, being in that Parliament which began in the precedent *March*, 3. *Carol.* at which time the Judgment given in the Kings Bench about *Habeas Corpus* was newly reversed, which concerned the freedom of our persons, the liberty of Speech invaded in this case; and not long after the same Judges (with some others) Joyned with them in the Cases of Ship-Money, invaded the propriety of our Goods and Estates; so that their Lordships find every part of these Words for which those worthy persons were accused Justified.

If any man should speak against any of the great Officers, as the Chancellor or Treasurer, or any of the rest recited in those Acts, as by accusing them of Corruption, ill Counsell, or the like, he might possibly justifie himself by proving of it; but in this Case it was impossible to do it, because those Judgments had preceded and concluded him, for he could make none, but by alledging their own Judgements which they themselves had resolved, and would not therefore allow to be Crimes, which they had made for Lawes.

He did inform their Lordships that the Bill in the Rolls hath another Title then that he did mention; this being that, that the Clarkes knew it by, rather than the proper Title.

The Words in the Case are charged *ea intentione*, which ought not to be; for it is cleere, and undoubted Law, that whatever is in it self lawfull, cannot have an unlawful intent annexed to it. Things unlawful may be made an higher Crime by the illness of the intent; for instance, taking away my Horse is a Trespasse onely, but intending to steal him makes it Felony: borrowing my Horse, though intending to steal him is not felony, because borrowing is lawful; and there were no use of freedom of speech otherwise, for a depraved intention may be annexed to any the most Justifiable Action: If a man eate no flesh he may be accused for the depraved intention of bringing in the *Pythagorian* Religion and subverting the *Christian*: If a man drink water, he may be accused of the depraved intention of Subverting the Kings Government, by destroying his Revenue both of Excise and Custome.

No man can make a doubt, but whatsoever is once Enacted is lawful; but nothing can come into an Act of Parliament but it must be first offered or propounded by some body, so that if the Act can wrong no body, no more can the first propounding; the Members must be as free as the Houses; An Act of Parliament cannot disturbe the State, therefore the Debate that tends to it cannot, for it must be propounded and debated before it can be Enacted.

In the Reign of *Henry the Eighth*, when there were so many persons taken by Act of Parliament out of the Lords House, as the Abbots and Priors, and all the Religious Houses and Lands taken away, It had

had been a strange Information against any Member of Parliament then, for propounding so great an alteration in Church and State;

Besides, Religion it self began then to be altered, and was perfected in the beginning of *Edward the Sixths* Reigne, and returned again to Popery in the beginning of *Queen Mariess*; and the Protestant Religion restored again in the beginning of *Queen Elizabeths*;

Should a Member of Parliament in any of these times have been justly informed against in the Kings Bench for propounding or debating any of these alterations: So that their Lordships perceive the reasons and inducements the House of Commons had to pass these Votes now presented to their Lordships.

After these Votes were read, viz,

Resolved, &c.

That the Act of Parliament 4 Henry Eighth, commonly Intituled, An Act concerning Richard Strowde, is a general Law, extending to indemnifie all and every the Members of both Houses of Parliament in all Parliaments for and touching any Bills, Speaking, Reasoning or Declaring of any matter or Matters in and concerning the Parliament, to be Communed and Created of; and is a Declaratory Law of the Ancient and necessary Rights and Priviledges of Parliament.

Resolved, &c.

That the Judgment given 5 Caroli against Sir John Elliot, Denzell Holles, and Benjamin Valentine Esquires, in the Kings Bench, was an illegall Judgment, and against the freedom and Priviledge of Parliament;

To both which Votes the Lords agree with the House of Commons.

UPon consideration had this day of a Judgment given in the Court of Kings Bench in Michaelmas Terme, in the fifth Year of King Charles the First, against Sir John Elliot Knight, Denzell Holles, and Benjamin Valentine Esquires, which Judgment is found to be erroneous; It is ordered by the Lords Spiritual and Temporal in Parliament assembled, That the said Denzell Holles Esquire (now Lord Holles, Baron of Ifield) be desired to cause the Roll of the Court of Kings Bench wherein the said Judgment is recorded, to be brought before the Lords in Parliament by a Writ of Error, to the end that such further Judgment may be given upon the said Case, as this House shall find meet;

A Message was sent to the House of Commons by Sir William Childe, and Sir Justinian Lewin, to acquaint them, that the Lords do agree to those Votes which were deliberated at the Conference yesterday.

Die Mercurii 15^o April 1668.

Whereas Councel have been this day heard at the Bar, as well to argue the Errors assigned by the Lord Holles, Baron of Ifield, upon a Writ of Error depending in this Plea, brought against a Judgment given in the Court of Kings Bench in 5 Car 1^{mi} against the said Lord Holles, by the name of Denzel Holles Esq; and others; As also to maintain and defend the said Judgment on his Majesties behalf: Upon due consideration had of what hath been offered on both parts thereupon, the Lords Spiritual and Temporal in Parliament, do order and adjudge, That the said Judgment given in the Court of Kings Bench in 5 Car. primi against the said Denzell Holles and others, shall be reversed.

The form whereof (to be affixed to the Transcript of the Record) followeth;

ET quia Curia Parliamenti de Judio suo de & super premissis redend' nondum advisatur, dies datus est tam predict. Galfrido Palmer militi & Baronet, qui sequitur, &c. quam predict. Denzel Dominus Holles coram eadem Curia usque ad diem Mercurii decimum quintum diem Aprilis tunc proximum sequentem apud Westmonast. in Comitatu Midd. de judicio suo inde audiend. eo quod Curia predict. nondum, &c. Ad quem diem coram Curia predict. venit tam predict. Galfridus Palmer qui sequitur, &c. quam predictus Denzel Dominus Holles in propriis personis suis. Super quo, visis, & per eandem Curiam nunc hic plenius intellectis omnibus & singulis premissis, maturaque deliberatione inde habita, Consideratum est per Curiam predictam, Quod Judicium predict. ob errores predictos & alios in Recordo & Processu predictis compertos Revocetur, Adnulletur & penitus pro Nullo habeatur. Et quod predict. Denzel Dominus Holles ad omnia que idem Denzel Dominus Holles occasione Judicii predict. amisit Restituatur.

Jo. Browne, Cleric.

Parliamentorum.



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Where it ſhall be awarded to the Co-		the Archbiſhop,	342.
toners, where the Sheriff is Plaintiff		Writ of Reſtitution awarded upon an	
or Defendant,	415.416.	<i>Ejectione firma</i> for Tythes,	201.
Writ of Right of Advowſon, the man-		Awarded to the Eccleſiaſtical Court,	
ner of proceedings therein,	511.	for the admitting and ſwearing of a	
574.589.590.591.592.		Churchwarden,	
Writ of <i>Quod ei deſorceat</i> , where it		For the admitting and ſwearing of the	
may be general and count ſpecial in		Clerk of a Pariſh,	589.
what Action he will,	444.445.	Writ of Priviledg, to diſcharge an At-	
Writ demanding 15. <i>acr. Jampn. &</i>		torney or Clerk of the Court from	
<i>Brueria</i> : whether it be incertain,	179.	being preſſed for a Soldier,	11.
Writ of Enquiry of Waſte is not a		From being Conſtable, &c.	389.
meer Inqueſt of Office, but in na-		Writ of Priviledge for Serjeants at	
		Law, and their Servants, to be ſued	
		only in the Common Bench,	84.85.
		Writ of <i>Diſtringas Villata circumad-</i>	
		<i>jacent. ad levand. Sepes, &c.</i> upon	
		the Statute of 13 Ed. 1. 280.281.	
		439.440.580.	

* Γένος. *Famq; noſter* * Agricola, *Poſteritati narratus & traditus, ſuperſtes erit.*

Tac. in vita Julii Agricola,
Socris ſui.

In

In the years when these Cases were adjudged,
these persons were Keepers of the Great
Seal, Justices of both Benches, and Barons
of the Exchequer.

Keepers of the Great Seal.



*T*he beginning of his
Reign, John Williams,
Bishop of Lincoln, was
Keeper of the Great Seal.

Anno 1 Car.Regis,

Upon the 27 day of October fol-
lowing, the said Bishop was discharged
of that place. And upon the 30 of the
same month Sir Thomas Coventry
Knight, the Kings Attorney, was made
Keeper of the Great Seal.

Anno 15 Car.Reg.

Upon the 14 of January, the said Sir
Thomas Coventry departed this life :
And upon the 18 day thereof Sir John
Fynch, chief Justice of the Common
Bench, was made Keeper of the Great
Seal.

Anno 16 Car.Reg.

Upon the 19. day of January Sir Ed-
ward Littleton, chief Justice of the Com-
mon Bench was made and sworn Keeper
of the Great Seal, in the place of Sir John
Fynch.

Justices of the Kings Bench.

Anno 1 Car. Reg.

{ Sir Randolph Crew, chief
Justice,
Sir John Doderidge,
Sir William Jones,
Sir James Whitlock, }

Knights.

The Table of the Judges, &c.

- Anno 2 Car. Reg. *In Mich. Term, Sir Randolph Crew was removed from his place : And in Hil- lary Term following, Sir Nicholas Hide Knight, was made chief Justice.*
- Anno 4 Car. Reg. *Upon the 11 of September, Sir John Doderidg died : And upon the 9. of October following, Sir George Croke was removed from the Common Bench, and made one of the Justices of the Kings Bench.*
- Anno 7 Car. Reg. *In the Summer Vacation, viz. 25 August, Sir Nicholas Hide died : And in Mi- chaelmas Term following, viz. 24 Octob. Sir Thomas Richardson, chief Justice of the Common Bench, was sworn chief Justice.*
- Anno 8 Car. Reg. *Sir James Whitlock died in the Sum- mer Vacation : And in Michaelmas Term following, Sir Robert Berkeley Knight, and the Kings Serjeant, was sworn one of the Justices of the Kings Bench.*
- Anno 10 Car. Reg. *In the Michaelmas Vacation, Sir Thomas Richardson died : And,*
- Anno 11 Car. Reg. *Termino Pasch. Sir John Brampton Knight was made chief Justice.*
- Anno 16 Car. Reg. *Upon the 9. of December, Sir Willi- am Jones died : And in Hilary Term following, Sir Robert Heath was sworn one of the Justices of that Court.*

Justices of the Common Bench.

- Anno 1 Car. Reg. { *Sir Henry Hobert Knight and Baro-
net, chief Justice.
Sir Richard Hutton,
Sir Francis Harvy,
Sir George Croke,
Sir Henry Yelverton,* } *Knights.*

Anno

The Table of the Judges, &c.

Anno 1 Car. Reg. *In Michaelmas Vacation, Sir Henry Herbert died: And,*

Anno 2 Car. Reg. *Upon the last day of Michaelmas Term, Sir Thomas Richardson Knight, and Serjeant at Law was made chief Justice of the Common Bench.*

Anno 4 Car. Reg. Term. Mich. *Sir George Croke advanced to be Justice of the Kings Bench, ut supra.*

Anno 5 Car. Reg. Term. Hillarii, *Sir Henry Yelverton died: And Octabis Purificationis following, Sir Humphry Davenport Knight, was made one of the Justices of the Common Bench.*

Anno 7 Car. Reg. Term. Pasch. *Sir Humphry Davenport was made chief Baron of the Exchequer: And in Quindena of the same Term, Sir George Vernon was removed from being one of the Barons in the Exchequer, to be one of the Justices of the Common Bench.*

In eodem Anno, Term. Michaelis, *Sir Thomas Richardson advanced to be chief Justice, ut supra: And the same Term, viz. 27 Octob. Sir Robert Heath Knight, was made chief Justice of the Common Bench.*

Anno 8 Car. Reg. *Sir Francis Harvy died in the Summer Vacation: And in the Michaelmas Term following, Francis Crawley, the Queens Serjeant at Law, was made one of the Justices, &c.*

Anno 10 Car. Reg. *In the Summer Vacation, viz. 14 September, Sir Robert Heath was discharged of his place: And in tres Michaelis following, Sir John Fynch Knight, of the Kings learned Counsel and Attorney to the Queen, was made chief Justice of that Court.*

Anno

The Table of the Judges, &c.

- Anno 14 Car.Reg. *In Hillary Vacation, Sir Richard Hut-*
ton departed this life.
- Anno 15 Car.Reg. *In Mens. Pasch. Edmond Reve Ser-*
jeant at Law was sworn one of the Ju-
stices of the Common Bench.
- In eodem Anno, *Sir George Vernon died in the Mi-*
chaelmas Vacation: And in the Hillary
Term following, Robert Foster Serje-
ant at Law, was sworn Justice of the
Common Bench.
- In eisdem Anno & Termino, *Sir John Fynch was made*
Keeper of the Great Seal, ut supra: And
Sir Edward Littleton Knight, Solicitor
General, was then made chief Justice of
the Common Bench.
- Anno 16 Car.Reg. Term. Hillarii, *Sir Edward Littleton*
was made Keeper, ut supra: And the same
Term, Sir John Banks Knight, Attorney
General, was made chief Justice of the
Common Bench.

Barons of the Exchequer.

- | | |
|--|--|
| | <div style="display: flex; align-items: center; justify-content: center;"> <div style="display: flex; flex-direction: column; align-items: center;"> <div style="margin-bottom: 2px;">Sir Joh. Walter chief Baron,</div> <div style="margin-bottom: 2px;">Sir Edward Bromley,</div> <div style="margin-bottom: 2px;">Sir John Denham,</div> <div style="margin-bottom: 2px;">Sir Thomas Trevor,</div> </div> <div style="font-size: 3em; margin: 0 10px;">}</div> <div style="margin-bottom: 2px;">Knights.</div> </div> |
|--|--|
- Anno 1 Car Regis, *Sir Joh. Walter chief Baron,*
Sir Edward Bromley,
Sir John Denham,
Sir Thomas Trevor,
- Anno 3 Car. Reg. *Sir Edward Bromley died in the Sum-*
mer Vacation: And in Termino Mi-
chaelis following, Sir George Vernon
Knight, was made one of the Barons of
the Exchequer.
- Anno 5 Car. Reg Term. Mich. *Sir John Walter was*
commanded to forbear the exercising of
his place; yet held the same by his Pa-
tent, until his death, being upon the 18 of
November Anno 6. Car. Reg.
- Anno 7 Car. Reg. Termin. Pasch. *Sir Humphry Daven-*
port, one of the Justices of the Common
Bench, was made chief Baron, ut supra.

In

The Table of the Judges, &c.

In eisdem Anno & Termino Sir James Weston Knight, *was made one of the Barons of the Exchequer in the place of Sir George Vernon, who was advanced to the Common Bench, ut supra.*

Anno 9 Car. Reg. Termino Hillarii, Sir James Weston *departed this life.*

Anno 10 Car. Reg. Term. Pasch. Richard Weston Serjeant at Law, *was made one of the Barons of the Exchequer.*

Anno 14 Car. Reg. Richard Weston removed, and in Hilary Term, eodem anno, Edward Henden Serjeant at Law, *was made one of the Barons of the Exchequer.*

F I N I S.



Mantissa.

Pag. 181. *The King against Sir John Eliot, Denzill Hollis, and Benjamin Valentine. Nota,* That afterwards, in the Parliament, 17 Car. it was resolved by the House of Commons, That they should have recompence for their Damages, Losses, Imprisonments, and sufferings sustained for the Services to the Common-wealth in the Parliament, 3 Caroli.

Pag. 296. *Resolution upon the Cases of Admiral Jurisdiction. Nota,* These were not Judicial Resolutions, and therefore not Authentick. *Vide* an Ordinance 12 Aprilis, 1647, touching the same.

Pag. 524. *The Lord Sayes Case, Nota,* The Resolution in Mr. Hampdens Case there cited, was adjudged to be against Law, and repealed by the Statute of 17 Car. *Vide infra*, pag. 601.



